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New York (State) Reports.

CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE

CODE OF CIVIL PROCEDURE

AND

THE GENERAL CIVIL PRACTICE

OF THE

STATE OF NEW YORK.

REPORTED WITH NOTES

BY

HY. HUFFMAN BROWNE

OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: NEW YORK REPORTS, VOL. 106; HUN'S REPORTS, VOLS. 45, 46; NEW YORK SUPERIOR COURT REPORTS, VOL. 53; DEMEREST'S SURROGATES REPORTS, VOL. 5; AND N. Y. CIVIL PROCEDURE REPORTS, VOL. 13.

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Civil Procedure Reports.

WHITHERS, Appellant, *v.* TOULMIN, Respondent.

City Court of New York, General Term, September, 1887.

§ 531.

Bills of particulars—When should be verified

Where an account, a further account, or a bill of particulars is required to be served, it must be verified if the pleading is verified.

In construing any part of a law, the whole must be considered; the different parts reflect light on each other, and, if possible, such construction is to be made as will avoid inconsistency.

(*Decided September* 30, 1887.)

Appeal by plaintiff from an order of the special term setting aside a judgment entered by default, and from an order requiring the plaintiff to serve a further bill of particulars.*

This action was commenced on April 23, 1887, and an amended complaint, which was duly verified, served May

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* The opinion reported considers the first of these appeals (which were taken together) only.

12, 1887, in which was set up a cause of action for services alleged to have been rendered by the plaintiff for the defendant as broker in negotiating for and procuring loans upon certain property situate in the city of Brooklyn, which services were alleged to be worth the sum of $160. On June 7, 1887, an order was made by the special term of this court directing the plaintiff to serve on the defendant's attorney, within three days from that day, "a bill of particulars of the services alleged in the amended complaint herein, and that the defendant have two days after the service of said bill of particulars in which to serve his answer to the amended complaint," which order was duly served upon the plaintiff's attorney on the same day. On June 9, the plaintiff's attorney served an unverified bill of particulars, which the defendant's attorney forthwith returned with an indorsement stating that it was returned because not verified. On June 13, the defendant not having served an answer, the plaintiff entered judgment by default, and served notice of retaxation of costs; and the defendant on the following day procured an order to show cause why the default should not be opened and the defendant have such other and further relief as may be just. This motion was granted at special term and this appeal thereafter taken by the plaintiff.

Horace Secor, Jr. (*John T. Cornell*, attorney), for the plaintiff-appellant.

Defendant was not entitled to a verified bill of particulars. Section 531 of the Code relates to accounts, and also to bills of particulars, and, while their object is substantially the same, the practice in regard to them differs. With the exception of the last sentence, the entire section relates solely to obtaining a copy of the items of an account, which, if the pleading is verified, must also be verified. There is no authority, statutory or otherwise, to the effect that a bill of particulars must be verified.

. . . The defendant is not called upon to answer the bill of particulars, which forms no part of the record, but merely to answer the complaint, which is already verified. Kneiss *v.* Seligman, 5 *How. Pr.* 425. The particulars are considered as incorporated with the already verified complaint. Dwight *v.* Germania Life Ins. Co., 84 *N. Y.* 493. No verification appears in 2 *Abb. Forms*, p. 186, to a bill of particulars, nor any allusion to one in 2 *Wait Pr.* 350. Furthermore, even when a bill of particulars is insufficient, the party should apply for a further bill and not return the one served. Stanley *v.* Millard, 4 *Hill*, 50. The same is true where an improper account is served. *Code Civ. Pro.* § 531. Plaintiff having complied with the order, and properly entered his judgment.

Edgar A. Hutchins, for defendant-respondent.

The order of June 16 was properly granted; the default was improperly taken; the time to answer had been extended to two days after service of a bill of particulars. The paper served was not a bill of particulars as required by the Code, for it was not verified. Section 531 of the Code of Civil Procedure expressly requires the bill of particulars to be verified if (as in this case) the complaiut is verified. It was, therefore, properly returned, and the plantiff was at fault, and not the defendant. Hoag *v.* Weston, 10 *N. Y. Civ. Pro.* 92.

An examination of section 531 of the Code of Civil Procedure shows that "bill of particulars" in the last clause, and "account" in the earlier portion, refer to the same thing. If this is not so the court is nowhere given authority to order a bill of particulars of what appellant calls, by way of distinction, an "account," except in cases where one has been served without an order and a "further" account is asked for. And yet the courts are continually directing bills of particulars of accounts (in a book-keeping sense) as well as of other claims. The decisions in regard to bills of particulars use the words

"account" and "bill of particulars" interchangeably. For example, in Gee *v.* Chase Manufacturing Company, 12 *Hun*, 630, the claim sued on was an account of several items. The appellant had been ordered to furnish a more detailed statement. The general term in its opinion calls this a bill of particulars, using that phrase as covering all kinds of claims, and including the account of items. In other words, the last clause of section 531 merely gives the court a right (otherwise not conferred) to order what the former portion of the clause has provided may be demanded. I presume it is for this reason that neither my adversary nor myself has been able to find a case bearing on the question of verification. The clause requiring it is so plain that it has never been disputed.

Per Curiam.—[McAdam, Ch. J., and Hall, J.]—If the items of an account are delivered under section 531 of the Code, they must be verified if the pleading is verified. That section expressly so provides. It also authorizes the court to direct "a further account" or a "bill of particulars" of the claim of either party to be delivered to the adverse party, and is silent as to whether such further account or bill of particulars should be verified or not. It is elementary that in construing any part of a law the whole must be considered; the different parts reflect light on each other, and, if possible, such a construction is to be made as will avoid any inconsistency. Effect must be given to every part to make the whole harmonious. It will be implied, therefore, that the Legislature intended to make the system uniform, and that when it required an account to be verified it intended that a further account, if ordered, should be verified also, and intended the same formality in regard to the bills of particulars, for what is fairly implied in an act is as much granted as what is expressed.

According to these just rules of interpretation which give effect to the spirit and intent of the section under

consideration, it follows, in any case wherein an account, further account or bill of particulars is ordered, that if the pleading is verified, the account, further account or bill of particulars (terms sometimes used interchangeably) must be verified also.

If this interpretation be correct, the court below disposed of the motion properly and the order appealed from must be affirmed, with costs.*

ADOLPH, Respondent, *v.* De CEN et al., Appellants.

Supreme Court, Fifth Department, General Term, June, 1887.

§§ 2947, 2948, subd. 1, 3070, 3262.

Appeal from justice's court—Costs—Who entitled to—Taxation—Counter-claim—When extinguished.

Where, in an action in a justice's court, the plaintiff recovered judgment for $200 and costs, and the defendant appealed therefrom, and thereafter the defendant was allowed to amend his answer by setting up a counter-claim for $380.95, and on the trial it was found that the plaintiff's claim amounted to $562, and the defendant's counter-claim

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* The opinion of the justice determining this case at special term, is as follows:

Nehrbas, J.—Section 531 of the Code requires a bill of particulars to be verified if the pleadings are verified. No distinction is made between items of an account or other particulars. The unverified bill was properly returned, and under the stipulation the answer is not yet due. The judgment was irregularly entered and must be set aside and a proper bill of particulars served before the answer need be served. $10 costs to defendant to abide event. See Hoag *v.* Western, 10 *N. Y. Civ. Pro.* 92.

to $459.69, and judgment was rendered in favor of the plaintiff for $102.31,—*Held,* that the judgment was more favorable to the plaintiff than that rendered in the justice's court, and also exceeded the amount of an offer to accept judgment for $150 made by him; that, in determining the right to costs in such a case, the counter-claim extinguished by the determination should be taken into consideration.

Where the plaintiff in an action in a justice's court recovers judgment, counter-claims existing in favor of the defendant, but not pleaded, which exceed the amount of plaintiff's recovery by $200, are not extinguished thereby.

Where a taxation of costs in favor of the defendant in an action is set aside for the reason that plaintiff is entitled to costs, the court should not adjust the costs, but should direct the clerk to tax them in favor of the plaintiff.

(*Decided June* 25, 1887.)

Appeal by defendant from an order of the special term of the superior court of Buffalo, setting aside a taxation of costs in favor of the defendant and allowing the costs to plaintiff.

The opinion states the facts.

Frank R. Perkins, for defendants-appellants.

George Osgoodby, for plaintiff-respondent.

Smith, P. J.—The following facts appear by the stipulation of the parties. Judgment was rendered in a justice's court in the city of Buffalo, November 16, 1878, in favor of the plaintiff against the defendants, for $200 damages and $5.28 costs. The complaint in the justice's court alleged that defendants were indebted to plaintiff for whiskey barrels sold to, and cash paid for, defendants, and demanded judgment for $200. The answer was a denial only. The defendants appealed from the judgment to the superior court, for a new trial, alleging certain grounds of appeal, and stating that the judgment should have been more favorable to defendants, in

that it should have been in favor of plaintiff for $30 instead of $200. On December 10, 1878, an offer to modify the judgment so as to reduce the recovery to $150, was made by the plaintiff, but it was not accepted. February 14, 1879, the appellants obtained an order in the superior court, giving them leave to amend their answer, and they accordingly served an amended answer, which set up (in addition to the answer in the justice's court), payment of $100 and upwards, and counter-claims amounting to $380.95, and demanded judgment against plaintiff for $450, besides costs. A reply was served to the counter-claim, and the cause was referred for trial. The referee reported that defendants were indebted to plaintiff in the sum of $562, and that under their amended answer they established counter-claims amounting to $459.69, which, deducted from plaintiff's claim, left a balance due plaintiff of $102.31, which, with interest upon it to date of report, amounted to $105.20. By the judgment in the superior court, the counter-claims of the defendants set up in their amended answer to the amount of $459.69 were satisfied and canceled, and a recovery for $105.20 in addition was had by the plaintiff. Judgment was entered May 19, 1886, on the report, for $105.20, with interest from date of report, $44.85, making $150.05, besides costs.

Upon these facts, we think the plaintiff is entitled to costs, for the reason that the counter-claims extinguished, and the sum reported in his favor, exceed in amount not only the sum which he offered to accept in satisfaction of the judgment, but also his recovery in the justice's court. (*Code Civ. Pro.* § 3070; Tompkins *v.* Ives, 36 *N. Y.* 75, and cases there cited by Foster, J.). The appellants' counsel contends that the counter-claims should not be taken into the account, they having been extinguished, as he claims, by the justice's judgment. In that he is mistaken. Section 2947 of the Code of Civil Procedure, cited by him, does not apply, for the reason that the amount of

the counter-claims is $200 more than the judgment recovered before the justice (*Code Civ. Pro.* § 2948, subd. 1).

It follows that, so far as the order appealed from denies costs to the defendants and holds that the plaintiff is entitled to costs, it is right.

But in allowing to the plaintiff, as his costs and disbursements, the sum of $70.25, at which they were taxed by the clerk, *ex parte*, the order is erroneous. Instead of doing that, it should have set aside the taxation of the clerk and sent the matter back to him with a direction to retax the plaintiff's costs on notice.* The defendants have not been heard before the taxing officer upon the items of the bill.

The costs were first taxed *ex parte*, entered in the judgment, and notice of retaxation was then served. Defendants appeared, and insisted that the plaintiff was not entitled to costs, but that the clerk should tax costs in favor of the defendants, and they presented their bill for that purpose. The clerk ruled accordingly, and taxed defendant's costs, and consequently there was no hearing upon the items of the plaintiff's bill, and no occasion to call them in question.

The order appealed from should be modified in accordance with these views, and, as so modified, affirmed, without costs of this appeal to either party.

Haight and Bradley, JJ., concur.

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* *Code Civ. Pro.* § 3262. See also Higgins *v.* Callahan, 2 *N. Y. Civ. Pro.* 302; Mathews *v.* Matson, 3 *Id.* 157; O'Loughlin *v.* Geo. H. Hammond & Co., 11 *Id.* 170.

COFFIN AND ANOTHER v. NORTH-WESTERN CONSTRUCTION COMPANY.

SUPREME COURT FIRST DEPARTMENT, NEW YORK COUNTY, CHAMBERS, OCTOBER, 1887.

§ 648.

Attachment—What is sufficient taking of property into possession of sheriff to constitute a levy.

Where a sheriff to whom an attachment had been issued, demanded of a trust company the delivery to him of bonds belonging to the defendant, and, upon the company's refusal to make delivery, threatened to break open the safes of the company, and forcibly take possession thereof, whereupon it was agreed that the bonds should be placed in the sheriff's view, and that he should thereupon take them into his possession and levy upon them, but they should be returned to the trust company to be held by it as his depository,—*Held*, that the sheriff had levied upon such bonds and had sufficiently taken them into his possession to entitle him, upon a settlement of the case, to fees for making the levy; that, if the sheriff saw fit to take the risk, he could, after making the levy, place the bonds in the custody of the trust company as his depository.

Warner *v.* Fourth National Bank (12 *N. Y. Civ. Pro.* 186), Anthony *v.* Wood (6 *Id.* 164) distinguished.

(*Decided October* 5, 1887.)

Taxation of sheriff's fees upon attachment.

This action was brought to recover $52,500 damages for breach of a contract. On June 22, 1887, an attachment was issued against the property of the defendant to the sheriff of the city and county of New York, in conformity with which the sheriff sought to attach 100 bonds of the Kansas City, Wyandotte & North-Western Railway Company, of the par value of $1,000 each, the property of the defendant, which were in the possession of the Central Trust Company of New York, and did so attach them in

the manner stated in the opinion here reported; but subsequently, at the request of the plaintiff's attorney, he released fifty of them. Thereafter the action was settled between the parties for the sum of $5,000, and an order discontinuing the action and vacating the attachment was duly entered. Other facts appear in the opinion.

Charles Henry Jackson, for plaintiff.

Cochran & Clark, for the sheriff.

Lawrence, J.—In this case, I think that there was such an actual taking of the bonds into the possession of the sheriff as to satisfy the statute. The allegation in the sheriff's affidavit is that, after a long consultation between himself and his counsel, and the counsel representing the defendants, and the counsel for the Central Trust Company, it was decided that the bonds in question should be placed in "my view, and that I should thereupon take them into my possession and levy upon them; that I should then return them to the Central Trust Company, to be held by said company as my depository; that the said decision, however, was not arrived at until after I had threatened that, in case the trust company still refused to deliver to me the bonds in question, that I would break open the safes of the company and forcibly take possession of the bonds." This allegation is not denied in the affidavit of the plaintiff's counsel.

If the sheriff saw fit to take the risk, it seems to me that after having made that levy he could place the bonds in the custody of the trust company as his depository. It also appears by the affidavit, that at the time this arrangement was arrived at, the persons who claimed to be the owners of the bonds, through their counsel, gave notice to the sheriff that he would be held responsible for any damages that might ensue to the owners of the bonds from the depreciation in their value during the time

they were held by him, in virtue of the aforesaid levy; that the next day he was served with a formal notice of claim; that he thereupon demanded a bond of indemnity from the plaintiffs; and that several sureties were offered to him; and that, from the 28th of June, 1887, to the day of settlement, the said bond had not been given to him, although there had been many conversations between the attorneys relative to the giving of said bond.

In the case of Warner *v.* Fourth Nat. Bank (12 *N. Y. Civ. Pro.* 186), the sheriff did not take the securities into his actual custody at the time that he served the warrant of attachment. In Anthony *v.* Wood (6 *N. Y. Civ. Pro.* 164), no levy was made under the warrant, and the note was only delivered to the sheriff upon the order of the court. Herein I think consists the distinction between this cases and the case above referred to. The sum of $200 would, I think, be a fair "additional" compensation for the sheriff under section 3306 of the Code of Civil Procedure.

HECKMAN *v.* MACKEY.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, OCTOBER, 1887.

§§ 458 *et seq.*; 3268 *et seq.*

Poor person—When non-resident may sue as—Practice in Federal courts.

The practice in the United States circuit court located within this State in other than equity and admiralty causes, is by United States Revised Statutes, § 914, made to conform as near as may be to that of the State court. By the phrase "as near as may be," is conferred upon the court the power to reject any subordinate provision in such statute which in its judgment would unwisely incumber the administration of the law or tend to defeat the ends of justice.

The Federal courts, in construing a State act relating to practice, which

by the statute conforming the practice of the Federal courts to that of the State courts in which they are located is rendered applicable to it, will reject a construction placed upon it by the State courts, but not passed upon by its appellate tribunals, which tends to defeat the ends of justice.

A non-resident of the State may sue as a poor person in a Federal court located therein, notwithstanding the provisions of the Code of Civil Procedure requiring a non-resident plaintiff to give security for costs; and, *it seems*, that a proper construction of the provisions of the Code of Civil Procedure providing for suits *in forma pauperis*, and for the giving of security for costs does not make the granting of leave to sue as a poor person in a court of that State conditional upon the residence of the plaintiff within the State.

Anonymous (10 *Abb. N. C.* 80), Christian *v.* Gourge (10 *Id.* 82), Alexander *v.* Meyers (8 *Daly*, 112), not followed.

An order allowing the plaintiff in an action in the United States circuit court to sue as a poor person will not be vacated on the ground that the petition does not state that the plaintiff is a citizen of the United States, where that fact is necessary to give the court jurisdiction, if it appears from the complaint that the plaintiff is in fact such citizen; but the defect will be cured by permitting an affidavit as to that fact to be filed *nunc pro tunc*.

(*Decided October* 11, 1887.)

Motion by defendant to vacate an order allowing the plaintiff to sue *in forma pauperis*.

The opinion states the facts.

James Stikeman, for defendants and motion.

Wheeler & Cortis, for plaintiff, opposed.

Lacombe, J.—Defendant moves to vacate an order heretofore granted on petition, allowing plaintiff to prosecute this action as a pauper.

Plaintiff is a citizen and resident of New Jersey. It appears from the papers that he has sustained personal injuries as the result of an accident, caused, he contends, by defendant's negligence. Defendant is a citizen and resident of New York, in which State the accident happened.

Plaintiff is not worth more than $100, beside the wearing-apparel and furniture necessary for himself and his family and the subject matter of this action, and is unable to prosecute this action unless permitted to do so as a poor person.

In support of this motion defendant refers to three special term decisions of the supreme, superior and common pleas courts respectively (Anonymous, 10 *Abb. Pr. N. S.* 80 ; Christian *v.* Gourge, 10 *Id.* 82 ; Alexander *v.* Meyers, 8 *Daly*, 112) holding that a non-resident may not sue in the State courts as a poor person.

The practice of allowing paupers to have original writs and subpœnas gratis, and to have counsel and attorney assigned them without fee, and to be excused from paying costs when plaintiffs, dates back to the reign of Henry VII. (*Blacks. Comm.* book 3, chap. 24). The provisions of Revised Statutes and of the Code of Procedure are in substance a re-enactment of those contained in the original act, the limit of statutory poverty being raised between the revision of 1812 and the revision of 1830 from $20, —the equivalent of the £5 of the English statute,—to $100.

The decisions above cited proceed in part upon the theory that the later statute,—which requires non-residents to furnish security for costs,—is inconsistent with a policy which would allow an irresponsible non-resident to sue without even a liability for costs.

In the supreme and superior court cases, the causes of action arose in Pennsylvania, of which State plaintiffs were residents. In the common pleas case, both plaintiff and defendants were citizens of Georgia, where the cause of action arose, and the decision is based entirely on the proposition that "it is contrary to the policy of the law to encourage the bringing of actions in this State for torts committed in another State, where plaintiff and defendants are residents of such other State and were so when the wrong complained of was committed. If . . . such

person choose to prosecute in a foreign tribunal it should be under the usual liability for costs" (Alexander *v.* Meyer, 8 *Daly*, 112.)

The question has never been passed upon by an appellate State court. The State statute does not, either in its original or present form, contain any words importing a restriction of its privileges to the resident poor. The words used are, "a poor person," without qualification. The attention of the learned judges who delivered the opinions above cited, seems not to have been called to a distinction between the statutes before them. The pauper act is concerned with liability; the non-resident act with security. Plaintiffs generally are liable for costs, and it is expected that they will respond for them out of their property situated within the jurisdiction of the State. Non-resident plaintiffs, however, who are not supposed to have such property within the jurisdiction, are required to give security that they will so respond. This act, however, in no way enlarges their liability, nor is it necessarily inconsistent with an act which relieves any particular class from the obligation to respond for costs at all.

In the particular case at bar the plaintiff cannot, so far as appears, sue and make service of process in New Jersey, his native State. If the rule contended for were adopted he could not sue in the courts of the State where the wrong was done him; and if it were followed here, he would be left, solely because of his poverty, without any forum in which to vindicate his rights. Such a failure of justice should, if possible, be avoided.

The practice in this court in civil causes, other than equity and admiralty causes, is, by section 914 of the Revised Statutes, conformed, as near as may be, to that in the State courts. This phrase—"as near as may be"—was before the supreme court in the case of Indianapolis, &c. R. R. Co. *v.* Horst (93 *U. S.* 300), and the opinion expressed that the Federal courts "had the power to reject, as Congress doubtless expected they would do, any

subordinate provisions in such State statutes which in their judgment would unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals."

In the case at bar it is not even a question of disregarding a subordinate provision of a statute. The State act contains no language sustaining defendant's position, and the construction contended for has not been approved by any appellate tribunal of the State. Under these circumstances, such construction may be rejected as tending in this case to defeat the ends of justice.*

Defendant further contends that the order should be vacated, because the petition states that the plaintiff is a resident of the State of New Jersey, but does not state that he is a citizen of the United States.

Plaintiff is in fact both citizen and resident of New Jersey, and the proper averment as to citizenship appears in his complaint.

Under these circumstances, the order should not be set aside for lack of jurisdiction, but the plaintiff may be allowed to file *nunc pro tunc* as of the date of the presentation of his petition, an affidavit setting forth his citizenship.

* For some time the courts of this State refused to permit an infant to sue *in forma pauperis* for the reason that he was required by the Code to give security for costs. *Vide* Kleinpeter *v.* Enell (N. Y. Mar. Ct. Sp. T., May, 1882), 2 *N. Y. Civ. Pro.* 21; *In re* Daly (N. Y. Mar. Ct. Chamb., May, 1882) 2 *Id.* 22, *note.* But the later decisions established a different rule, and now an infant may prosecute an action *in forma pauperis,* notwithstanding the provisions requiring security for costs, and where he so prosecutes or leave to so prosecute is given, he will not be required to give security for costs. Erickson *v.* Poey (Ct. App. 1884), 5 *N. Y. Civ. Pro.* 379; Hayes *v.* Second Ave. R. R. Co. (Supm. Ct. N. Y. Co. Sp. T., March, 1884), 5 *Id.* 155; Hotaling *v.* McKenzie (Supm. Ct. Ulster Co. Sp. T., May, 1884), 7 *Id.* 320; Nichols *v.* Cammann (C. Ct. of Brooklyn, Aug. 1882), 2 *Id.* 375. Irving *v.* Garrity (Supm. Ct. Kings Co. Sp. T., Aug. 1883), 4 *Id.* 105. The same reasons that control in determining the right of an infant to sue as a poor person would seem to apply to the case of a non-resident plaintiff, and sustain the position taken in the opinion above reported.

Upon the filing of such affidavit, the motion to vacate the order allowing plaintiff to prosecute the action as a poor person is denied.

McILHANNEY *v.* MAGIE.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JUNE, 1887.

§§ 803, 804.

Discovery of books, etc.—When not ordered, because possession thereof positively denied.

A motion for a discovery of account-books will be denied, where the party from whom the discovery is sought positively denies that he has possession thereof.

(*Decided June,* 1887, *and October* 20, 1887.)

Application by plaintiff for a discovery of account books alleged to have been in possession or under control of the defendant.*

This action was brought to recover $1,500, alleged to have been wrongfully retained by the defendant while acting as the plaintiff's agent. The moving papers, including the complaint, petition and numerous affidavits, allege that defendant had various account-books which he as agent kept for plaintiff; that in these books are important entries essential to plaintiff in preparing for trial. Defendant denies positively that he has in his possession or under his control any of the books referred to in the petition and other moving papers. The defendant's denial was

* A prior application for discovery was made by plaintiff and denied; but on other grounds. See 12 *N. Y. Civ. Pro.* 27, where the decision is reported.

as follows: "I have not the books in my possession or under my control which the plaintiff describes. . . . I unqualifiedly deny that I have either in my possession or under my control the said books or any or either of the books. I further deny, without any reservation or qualification, that I ever had in my possession or under my control any books referred to in the said petition and order, except as previously stated in my affidavit."

The plaintiff submitted many affidavits to the effect that defendant had been known to have books in his possession. The allegations in these affidavits were controverted by defendant's affidavit. He also averred that plaintiff himself had possession of the books he sought to discover.

H. E. Hewson (*Hamilton Cole*, attorney), for plaintiff and motion.

The denial of the defendant is overcome by the affidavits submitted by plaintiff, and the rule on which defendant relies should not be adhered to in this case.

Chauncey B. Ripley, for defendant, opposed.

The court can not look beyond the unqualified denial of the defendant. Such denial puts an end to the proceedings. In Ahoyke *v.* Wolcott (4 *Abb. Pr.* 41), it is held: "When a party who is called on to make the discovery, denies under oath, the possession or control of the books, papers, &c., ordered to be produced, the court has no power to look behind the denial." In Bradstreet *v.* Bailey (4 *Abb. Pr.* 233), where a second application for discovery of books and papers was made by the petitioner, and the respondent answered "that to the best of his knowledge and belief, it" (the document sought to be discovered) was delivered to the defendant, "and positively" that it is not in his possession or under his control, and has not been, since a prior motion to this effect was made, which was denied"; the court say, per PEABODY, J.,—"*Ex necessitate*, this must be a sufficient reason for

refusing the order." The case of Hoyt *v.* American Exchange Bank (8 *How. Pr.* 89, 92), at general term, per Bosworth, J., holds: "If the party answers distinctly and unevasively, that as to all or any of the papers or documents or entries of which a discovery is sought, that there are no such papers or documents in his possession or under his control, and that there are no entries relating to the specific subject matter or except such as he has furnished copies of, the applicant must abide by the answer so far as proceedings for discovery are concerned." . . . . The present practice for the discovery of books and papers is virtually the same as it was formerly under the Revised Statutes, when the above cases were decided. The rules of court are essentially the same now as then. Cutter *v.* Pool, 54 *How. Pr.* 311; Shoe & Leather Reporter Association *v.* Bailey, 49 *N. Y. Super. Ct.* (17 *J. & S.*) 385; *Code Civil Pro.* § 804; *Supreme Court Rules*, XIV, XVII.

Lawrence, J.—As the defendant denies in the most positive terms that he has possession of the books referred to in the plaintiff's affidavits, the motion for a discovery must be denied.

Upon the same papers a re-argument was had in October, which resulted in the following decision.

Lawrence, J.—Having re-examined the affidavits in this case, I see no reason for changing the opinion heretofore expressed, that the motion for a discovery should be denied. Order granted.

JOHNSTONE, Respondent, *v.* CONNER and Another, Appellants.

City Court of New York, Special Term, June, 1887; and General Term, September, 1887.

§§ 1309, 1326, 1327.

Costs—Liability on undertaking on appeal where judgment affirmed as to one of several respondents—Notice of affirmance, when not necessary before suing on undertaking.

Where a judgment in favor of three defendants was affirmed with costs on appeal to the court of appeals as to one defendant, and reversed as to another, the defendant succeeding on such appeal is entitled to recover from the sureties upon an undertaking given to perfect the appeal and stay proceedings, the costs of the action and of the appeals, notwithstanding the judgment at trial term, and at general term was a joint judgment in favor of himself and the defendant as to whom they were reversed,[1,4,5] and the party as to whom the judgments are reversed is not a necessary party to such action. [3]

Where a joint judgment in favor of two defendants is affirmed as to one of them, and reversed as to the other, the latter, by force of the decision, ceases to have any proprietory interest therein; but as to the other party, it remains unimpaired and in full force; and he has power to enforce the judgment and is entitled to maintain an action upon an undertaking given by his opponent upon appeal therefrom. [1,5]

It is not necessary, before suing upon an undertaking on appeal to the court of appeals, to give notice of the affirmance of the judgment appealed from. [2]

Weil *v.* Kempf (12 *N. Y. Civ. Pro.* 379), followed. [2]

(*Decided at special term June* 30, 1887; *at general term, September* 30, 1887.)

Hearing at special term of demurrer to plaintiff's complaint.

This action was brought on an undertaking on appeal to

the court of appeals, executed by the defendants. It is alleged in the complaint that an action was brought by one William C. Conner in the supreme court in New York county against this plaintiff, Martin J. Keese and others, upon an indemnity bound executed by them, whereby they jointly and severally bond themselves to indemnify and save harmless the said Conner from loss or damage resulting from the misconduct of said Keese in executing the office of deputy sheriff, to which the said Conner had appointed him; the said Conner being at the time of such appointment the sheriff of the County of New York; that pending the action and before judgment said Conner died and the action was revived by his executors; and thereafter judgment was entered therein dismissing the complaint, and for the recovery by this plaintiff and said Keese, who appeared by the same attorneys, of the sum of $372.85, costs; that said Conner's executors appealed to the general term of the supreme court from said judgment, where it was affirmed, and a judgment duly entered on March 11, 1886, to that effect, and for the sum of $86.79 costs in favor of this plaintiff and said Keese; that thereafter the said executors appealed to the court of appeals from said judgment of affirmance, and for the perpose of staying proceedings the defendants duly made and filed with the clerk of the city and county of New York, their written undertaking, whereby they jointly and severally undertook that the said executors would pay all costs and damages which might be awarded against them on said appeal, not exceeding $500, and also that if the judgment so appealed from should be affirmed, or the appeal be dismissed, they would pay the sum directed to be paid by the judgment or any part thereof as to which it should be affirmed; that thereafter the said appeal was duly heard in the court of appeals and judgment was thereupon rendered affirming the judgment appealed from as to this plaintiff, with costs, and reversing it as to the said Keese, and ordering a new trial as to him with costs to abide the event; that the

remittitur from said court of appeals was filed on April 29, 1887, in the office of the clerk of the city and county of New York, and the judgment of the court of appeals duly made a judgment of the supreme court; that no part of said judgments for $372.85 and for $86.79 recovered as aforesaid has been paid, and that the costs awarded by the court of appeals to this plaintiff have been adjusted at the sum of $96.25, and that no part thereof has been paid. The defendants demurred to the complaint on the ground that it appeared upon the face thereof "(1) that it does not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties-plaintiff inasmuch as Martin J. Keese should be joined as a party-plaintiff; and (3) that there is a defect of parties-defendant inasmuch as that Martin J. Keese should be joined as a party-defendant."

Henry Thompson (*Vanderpoel, Green, Cuming & Goodwin*, attorneys), for defendants and demurrer.

George W. Stephens (*Foster & Stephens*, attorneys), for plaintiff, opposed.

NEBHRAS, J.—The complaint is the snpreme court was dismissed as to the defendants therein, Johnstone, plaintiff here, and Martin J. Keese, with $375.82 costs. The judgment entered on the dismissal was affirmed at the general term, with $86.29 costs. The plaintiff in said action appealed to the court of appeals, and the defendants executed the undertaking thereon, whereby they jointly and severally undertook that the apellant would pay all costs and damages that might he awarded against him on said appeal, not exceeding $500, and also, that if the judgment so appealed from should be affirmed or the appeal dismissed ,the appellant would pay the sum directed to be paid by the judgment, or any part thereof, as to which the judgment should be affirmed. The court of appeals affirmed the judgment as to Johnstone, plaintiff here, and

reversed as to Keese. The present action is by Johnstone, to recover from the defendants the amount of the two judgments for costs before referred to.

[1] The effect of the decision of the court of appeals reversing the judgment below as to Keese, but affirming it as to Johnstone, is to leave it unimpaired as to the latter, and void as to Keese. The latter, by force of this decision, ceases to have any proprietary interest in the judgments; but as to Johnstone, they remain unimpaired and in full force, and as Johnstone has power to enforce said judgment he is entitled to maintain this action in enforcement thereof (See Seacord *v.* Morgan, 35 *How. Pr.* 487).

[2] The undertaking sued upon being on appeal to the court of appeals, notice of affirmance was not necessary as a condition precedent to maintaining this action (See opinion of McAdam, Ch. J., in Weil *v.* Kempf, 12 *N. Y. Civ. Pro.* 379).

[ ] Keese, having no present interest in the judgment for costs, was neither a necessary nor a proper party to the action. The court of appeals might have modified the original judgment as to the costs, but did not, and consequently left them in full force except as to Keese, who is, by legal intendment, dropped from the judgment record, leaving Johnstone the sole creditor therein.

[ ] Johnstone and Keese were represented in the original action by the same attorney, and there seems to be no conflicting right or claim to the costs.

It follows that the plaintiff is entitled to judgment on the demurrer, with costs.

From the order and interlocutory judgment entered on this decision the defendants appealed to the general term of the city court of New York.

Henry Thompson (*Vanderpoel, Green, Cuming & Goodwin*, attorneys), for defendants appellants.

Defendants do not deny their liability upon the undertaking; but they insist that under the decision of the court of appeals, they are not liable to Johnstone for the full amount of both his and Keese's costs,— but only for Johnstone's; and that, as Keese's interest in them is not fixed or settled, neither indeed can be, until the new trial has been had, there is now no liability that can be adjudged and declared against them in this action . . . . . The obligation of the defendants is to Keese and Johnstone jointly. Johnstone has no several and separate cause of action upon such an obligation; at least until there has been an adjudication as to his co-obligee Keese. Benedict *v.* Dixon, 47 *N. Y. Super.* (15 *J. & S.*) 379 . . . . There is nothing in Seacord *v.* Morgan, 35 *How. Pr.* 487, which conflicts with these views. That case merely holds that an affirmative judgment against two, affirmed as to one and reversed as to the other, is "affirmed in part" within the meaning of section 335 of the old Code. The judgment here in favor of Johnstone was not an affirmative judgment. It was a dismissal of a complaint. It merely negatives the claimed liability. The costs are incidental to it—a penalty attached—and they are the costs, not of Johnstone alone, but of Keese also, and Keese's interest in the amount is not ascertained and cannot be in this action.

George W. Stephens (*Foster & Stephens*, attorneys), for plaintiff-respondent.

The judgment of the court of appeals conclusively determined that the defendant Johnstone's judgment, as affirmed by the general term, was correct To the extent that judgment granted him relief, it was affirmed. By the undertaking on appeal the sureties undertook to pay the judgment, so far as it might be affirmed in whole or in part. The respondent is, therefore, fully authorized to

maintain this action. Seacord *v.* Morgan, 35 *How. Pr.* 487. Both the respondent and his co-defendant were entitled to have recovered judgment in the original action, with costs, except for the fact that they had appeared by one attorney. In consequence of that fact, while the law gave them both costs, it gave execution to but one of them. When, however, as in the present instance, the liability of these defendants became severed, then the defendant Johnstone became entitled to the full amount of costs to which he would have been entitled in case he had been the sole defendant; nor is there anything in section 3239 of the Code which limits respondent's right to costs, because the limitation there imposed only refers to the case where the plaintiff is entitled to costs against one of the defendants and not against all. In the present instance, the plaintiff is not entitled to costs against any defendant.

Per Curiam.—[McAdam, Ch. J., and Hall, J.]—The points urged by the appellants against the decision appealed from are fully answered by the opinion of the [5] court below. The decision of the court of appeals in the action pending there, deprived Keese of any proprietary interest in the judgment recovered in the joint names of Keese and Johnstone; and, as the judgments were in all things affirmed as to Johnstone, it left him the sole owner thereof. The judgments are unpaid, and the sureties upon the appeal to the court of appeals, by the fair interpretation of their undertaking, must be held to have agreed to pay them in case of their affirmance by the appellate court. The form of affirmance is of no consequence, so long as the adjudication was absolute and final in favor of Johnstone, and conclusive against their principal. The contingency that has happened is one which the nature of the appeal made possible, and is, therefore, within the contemplation of the sureties when they voluntarily executed their undertaking. The judgment and order appealed from must be affirmed, with costs.

AGNEW, AN INFANT, BY HER GUARDIAN AD LITEM, RESPONDENT, *v.* THE BROOKLYN CITY RAILROAD COMPANY, APPELLANT.

CITY COURT OF BROOKLYN, GENERAL TERM, JUNE, 1887.

§§ 481, 546.

Pleading—When complaint in action to recover damages resulting from negligence, sufficiently definite and certain.

Where the complaint in an action for negligence, alleged that while the plaintiff was in the act of crossing the street on the sidewalk, the driver of a street-car so negligently and carelessly managed his horse that it knocked her down and injured her,—*Held,* that its statement of the cause of the casualty was sufficiently plain and concise, and the court should not compel the plaintiff to state further by what act of commission or omission the driver was negligent; that a motion to make the complaint more definite and certain in this particular was properly denied.

A party cannot obtain his opponent's evidence by a motion to make his complaint more definite and certain; but if he is entitled thereto, must seek it either under the provisions of the Code permitting an examination of a party before trial, or requiring the service of a bill of particulars.

(*Decided June* 27, 1887.)

Appeal from order of the special term denying a motion that the complaint be made more definite and certain.

The opinion states the facts.

Morris & Pearsall, for defendant-appellant.

Charles J. Patterson, for plaintiff-respondent.

VAN WYCK, J.—This is an appeal from an order denying a motion to have the complaint made more definite and certain.

The plaintiff, a child of five years, alleges that while she was in the act of crossing Sackett street, on the crosswalk, the driver of a one-horse street-car so negligently and carelessly managed his team that the horse knocked her down and injured her.

This is certainly a plain and concise statement of the facts constituting her cause of action, as required by *Code Civ. Pro.* § 481. The defendant insists that under section 546, the court should compel her to state what act of commisson or omission of the driver was negligent. The meaning and application of the allegation are definite and certain. It distinctly states negligence in its management and control of the team,—viz., that the driver brought his horse in contact with this plaintiff, when, by the exercise of ordinary care, he could have prevented it. Plaintiff could not furnish in her pleading more information in relation to the fact thus set forth, unless she pleaded the evidence by which she expected to prove this fact.

This is never desirable ; the form of this complaint is to be commended. If the defendant makes out a case in which he is entitled to the evidence, or part of it, it ought to apply to provisions of the Code, allowing the examination of a party before trial or compelling the party to furnish a bill of particulars.*

We see no reason for disturbing the decision of the court below exercised in denying the motion of defendant (Reardon *v.* N. Y. C. Co., 5 *N. Y. Super.* 514).

Order should be affirmed, with $10 costs and disbursements.

CLEMENT, Ch. J., concurred.

* See Tilton *v.* Beecher, 59 *N. Y.* 176 ; Brownell *v.* National Bk. of Gloversville, 13 *N. Y. Weekly Dig.* 371.

Estate of ANTHONY BATTLE, Deceased.

Surrogate's Court, New York County, May, 1887.

§§ 2281, 2286, 2552, 2555.

Contempt—When punishment discretionary—When order punishing should be refused.

A surrogate is not bound to grant an application to punish a party for contempt in disobeying a decree of his court as of course, but should grant or deny it in his sound discretion, and this discretion he should never exercise in favor a delinquent executor or administrator who has been directed to make payments of moneys previously adjudged to be in his hands and who has disobeyed such direction, except under extraordinary circumstances. Mere inability to obey the decree should not shield him, particularly where the inability was occasioned by his dishonesty or willful misappropriation of funds committed to him. [2]

Cochrane *v.* Ingersoll (73 *N. Y.* 613); [1, 7] Matter of Snyder (34 *Hun,* 302; aff'd, 103 *N. Y.* 178) followed [2, 3].

An administratrix will not be adjudged in contempt and punished therefor, if, upon the facts as disclosed, she being actually in confinement for the contempt, and her discharge being sought on the ground of her inability to obey the directions of the court, her application would be granted. [7]

Where, upon an application to punish an administratrix for contempt for failure to make payments out of the balance of an estate adjudged to be in her hands, it appeared that she was of the age of fifty-five years, and without means, and largely dependent upon charity; that since the death of the decedent, her husband, she had been almost totally blind, and before the entry of the decree she had expended the small estate left by him; that she was driven to do so by dire want, and only did it upon the promise of her brother, which was not fulfilled, that he would restore such sums to her as were needed for her support,—*Held,* that an order should not be made punishing her contempt in not obeying the surrogate's decree. [8]

Baucus *v.* Stover (89 *N. Y.*) followed. [6]

The fact that a surrogate's decree that an administratrix has funds in her hands is made conclusive by Code Civ. Pro. § 2552, does not prevent

her showing that she is without funds, in a proceeding to punish her for contempt. [5, 7]

(*Decided May* 22, 1887.)

Motion to punish an administratrix for her contempt in disobeying a decree directing the payment of money.

The opinion states the facts.

Boormaen & Hamilton, for petitioners and application.

B. D. Penfield, for administratrix, opposed.

Rollins, Surr.—This respondent Mary Battle, is the widow of the decedent and the administratrix of his estate. As such administratrix she filed an account in September, 1885, which was judicially settled by a decree of this court entered in July, 1886.

By that decree, she was ordered to make certain payments out of a balance of estate funds adjudged to be in her hands. This order she has not obeyed; and in behalf of six persons claiming to be aggrieved, to whom she was directed to pay in the aggregate the sum of $169.89, the surrogate is asked to imprison her for contempt.

Affidavits have been filed by her counsel alleging that she is of the age of fifty-five years ; that she is without means, and is largely dependent upon charity; that since the death of her husband in November, 1883, she has been almost totally blind; that before the entry of the decree of July, 1886, she had expended the small estate left by the decedent; that she was driven to this course by dire want, and only pursued it upon promise of her brother—a promise which he has not fulfilled and has been unable to fulfill—that he would restore to her such sums as she might be compelled to use for her support.

The proceeding is brought under section 2555 of the Code of Civil Procedure. That section declares that a decree of a surrogate "*may*" be enforced in the manner

therein prescribed. The Legislature has made use of this word "may" in providing by section 1241 for the enforcement of judgments.

[1] It was held by our court of last resort, upon appeal from the supreme court of the second department, in Cochrane *v.* Ingersoll (73 *N. Y.* 613), that an application under section 1241 to punish for contempt a person who had willfully neglected or refused to comply with the direction of a judgment, was addressed to the discretion of the court in which such judgment had been recovered.

The supreme court, at special term, having refused, in the case just cited, to enforce its judgment by imprisoning the judgment debtor, its action was sustained on appeal. DYKMAN, J., pronouncing the general term opinion (13 *Hun*, 368), referred to the provisions of section 20, title 13, chapter 8, part 3, Revised Statutes, 3 Banks' 6th ed. 841* (to the effect that a court which had directed the imprisonment for contempt of one who had failed to comply with its judgment might relieve the delinquent upon ascertaining that compliance was impossible), and approved Surrogate BRADFORD's suggestion in Doran *v.* Dempsey (1 *Bradf.* 490), that a state of facts which, pending one's imprisonment in contempt proceedings, would justify his unqualified discharge, would equally have justified the denial of an application for his commitment, if it had been brought, at the presentation of such application, to the attention of the court.

The doctrine was reiterated in Park *v.* Park (18 *Hun*, 466); its correctness was subsequently questioned in Strobridge *v.* Strobridge (21 *Id.* 288), but seems to have been squarely sustained by the court of appeals in Cochrane *v.* Ingersoll (*supra*).

The statute above cited is no longer in force, but its provisions have been substantially re-enacted in section 2286 of the Code of Civil Procedure. It seems to me, therefore, that when the surrogate is asked to im-

* 2 *R. S.* 538, § 20.

[2] prison for contempt one who is shown to have disobeyed a decree of this court, he is not bound to grant the application as of course, but should grant or deny it in his sound discretion. This discretion should never be exercised in favor of a delinquent executor or administrator, who has been directed to make payments from moneys previously adjudged to be in his hands, and who has disobeyed such discretion, except under extraordinary circumstances. His mere inability to obey such direction at the time it is sought to enforce it should not suffice of itself to shield him for commitment—especially in cases where that inability has been occasioned by his dishonesty or his willful misappropriation of the funds committed to his hands (Matter of Snyder, 34 *Hun*, 302; affirmed, 103 *N. Y.* 178).

[3] There is, indeed an intimation in the opinion of Danforth, J., in the case last cited, that when it has been shown to the surrogate, in a contempt proceeding, that an executor or administrator who has been adjudged to have in his hands funds of his decedent's estate, has knowingly neglected to obey a decree for a payment out of such funds, the surrogate may at that stage terminate the investigation and order the commitment of the delinquent.

But Judge Danforth subsequently says, after commenting upon the special facts of the case before him, "The surrogate was not necessarily concluded by these bald and uncorroborated assertions of the defaulting executor, and, as the question is not only to be determined upon evidence at least conflicting, but also rests in discretion which has not been unfairly exercised, we find no ground on which we can review the surrogate's decision," citing Cochrane *v.* Ingersoll (*supra*).

[4] This language seems to me to be quite inconsistent with the soundness of the claim of counsel for the moving party in the case at bar, that, even for shielding herself from imprisonment for contempt, the respondent

cannot, in the face of the decree of July 15, 1886, and the provisions of section 2552 of the Code of Civil Procedure, be permitted to show that in truth and in fact she has at all times, since such decree was entered, been utterly unable to obey its directions.

If such be the legitimate scope and effect of the language of section 2552 as to what shall constitute "conclusive evidence" of sufficiency of assets, it must follow that when this court has once directed an executor or administrator to be imprisoned for disobeying a decree for the payment of money, this same "conclusive evidence" must render it forever afterwards powerless to grant the offender any relief under section 2286 based upon his actual liability to do what has been required of him.

[5] It was held by the court of appeals, in Baucus *v.* Stover (89 *N. Y.* 1), that although an executor is de-
[6] clared, by section 13, title 3, chapter 6, part 2, Revised Statutes (3 Banks' 7th ed. 2296), * to be liable for his indebtedness to his testator "as for so much money in his hands at the time such debt becomes due," if nevertheless, "he should be wholly unable to pay the money, in pursuance of the order or decree of the surrogate, on account of his insolvency, he could not be attached and punished for contempt." An interpretation of section 2552, which would save this respondent from imprisonment (assuming that the statements in exoneration of her conduct are true) is in line with the interpretation of section 13, which has the sanction of our highest court in Baucus *v.* Stover.

[7] I feel warranted by the authorities above cited in applying to the case at bar the test which Judge Dykman applied to Cochrane *v.* Ingersoll, viz.: If this respondent was actually in confinement to-day for disobedience to the decree here sought to be enforced, and was now asking to be discharged because of her inability

* 2 R. S. 84, § 13.

to obey its directions, would her application commend itself to the approval of the court?

[8] I think it would and should, upon the papers before me, and must, therefore, dismiss the present proceeding, unless the moving party wishes to submit affidavits in opposition to those presented by the respondent, or to pursue before the surrogate an inquiry into the truth of the allegations in her behalf.

STAHL, Appellant, v. WADSWORTH and Another, Respondents.

Superior Court of Buffalo, General Term, July, 1887.

§ 66.

Attorney's lien—When notice of necessary—Effect of settlement by client.

The parties to an action have a perfect right to settle it, even though the attorney does not consent, and an executed settlement is binding upon them. [2]

The amendment of section 66 of the Code of Civil Procedure,—relating to attorney's liens,—made in 1879, did not provide a new remedy for the enforcement of such liens, but merely extended the lien so that it should cover, in addition to taxable costs, any agreed compensation between the attorney and the client; and now, as well before such amendment, a notice of the lien, so far as it extends beyond taxable costs, is necessary in order to uphold it against a *bona fide* settlement between the parties. [3, 18]

Rooney *v.* Second Ave R. R. Co. (18 *N. Y.* 368); [3] Wright *v.* Wright (70 *Id.* 98); [4, 5] Jenkins *v.* Adams (22 *Hun,* 600); [7] McCabe *v.* Fogg (60 *How. Pr.* 488); [8] Tullis *v.* Bushnell (65 *Id.* 465); [9] Goddard *v.* Trenbath (24 *Hun,* 182); [10] Wehle *v.* Conner (83 *N. Y.* 231); [11] Williams *v.* Ingersoll (89 *Id.* 508); [12] White *v.* Brady (4 *Monthly Law Bul.* 39); [13] *In re* Bailey (4 *N. Y. Civ. Pro.* 140; aff'd, 5 *Id.* 253); [14] followed.

Lewis *v.* Day (10 *Weekly Dig.* 49); [15] Coster *v.* Greenpoint Ferry Co. (5 *N. Y. Civ. Pro.* 146); [16] Moloughney *v.* Kavanagh (3 *Id.* 353);

[17] Naylor *v.* Lane (5 *Id.* 149); [16] Smith *v.* Baum (67 *How. Pr.* 267); [17] not followed.

Where the plaintiff in an action has settled with the defendant, and thereafter the defendant moves to discontinue, and the motion is opposed by the plaintiff's attorneys, on the ground that they have a lien for compensation upon the cause of action, an appeal from an order granting such motion should not be taken in the name of the plaintiff; the proper practice in such a case is for the attorney to move to vacate the settlement and for leave to prosecute the action for the lien, or to prosecute a direct proceeding in his own name for that purpose. [19, 29]

Dimick *v.* Cooley (3 *N. Y. Civ. Pro.* 141); [20] Goddard *v.* Trenbath (24 *Hun,* 182); [21] Murray *v.* Jibson (22 *Id.* 386); [22] Tullis *v.* Bushnell (65 *How. Pr.* 465); [23] Smith *v.* Baum (67 *Id.* 267); [24] Coster *v.* Greenpoint Ferry Co. (5 *N. Y. Civ. Pro.* 147); [25] La Blanche *v.* Kirkpatrick (8 *Id.* 256); [26] followed. Forstman *v.* Schulting (35 *Hun,* 504); [27] not followed. Wilber *v.* Baker (24 *Id.* 24), [28] distinguished.

Instance of a case in which a settlement of an action by a client without his attorney's knowledge was held not in fraud of the attorney. [1]

(*Decided July* 19, 1887.)

Appeal by plaintiff from order granting motion to discontinue action upon payment of costs.

The facts are stated in the opinion.

Spencer Clinton (*Henry L. Lyon,* attorney), for plaintiff-appellant.

George Wadsworth, defendant-respondent, in person.

Hopkins & White, for defendant-respondent, White.

HATCH, J.—This action was commenced by the service of a summons and complaint in September, 1885. The defendants answered separately. Issue was joined by the service of a reply in January, 1886. Before issue was joined, the parties settled, defendants paying to plaintiff the sum of $1,001, and by instrument under seal bearing date December 22, 1885, acknowledged that day, the plaintiff released, acquitted and discharged the defendants,

and each of them, from all liability on account of the demands, and cause of action mentioned and set forth in the complaint. No notice of such settlement was given to the attorney for the plaintiff, by the defendants, nor was he advised from any source of such settlement until the spring of 1886. Since said settlement, the defendant Wadsworth has served an amended answer, in the fourth count of which he alleges he has paid and satisfied the claim of the plaintiff. The cause has been referred for trial and determination. On October 7, 1886, the defendants served upon the plaintiff's attorney a notice stating that the action had been settled; that plaintiff had released the cause of action herein, and offered to pay said attorney his taxable costs and disbursements, and, also, offered to allow judgment to be entered against them for the amount of such costs and disbursements as adjusted. Said attorney refused to accept the same, and on January 9, 1887, he served upon defendants a written notice that he had a lien upon the cause of action to the extent of sixty per cent. thereof as compensation for his services in the action, and that he should not recognize payment of that sum to any other person. No other notice than this was ever given. Thereafter, defendants made a motion in this court, upon affidavits, and the papers and proceedings, for an order discontinuing said action, upon the payment of the taxable costs and disbursements to plaintiff's attorney. On the hearing of said motion the court ordered said action discontinued upon payment of costs and disbursements. Plaintiff appeals from said order to this court.

There are no facts stated in the opposing affidavits which tend in any manner to impeach the *bona fides* of the settlement. The statement that Wadsworth did not inform the attorney for the plaintiff until some time after the settlement does not tend to show fraud upon his part, or a design to cheat the attorney out of his costs. It appears that he knew nothing about the attorney's lien during any of this time, or until the attorney served his notice

of lien, which was sometime after. When defendants moved to give effect to said settlement, they offered to pay such costs as the law gave them notice that the attorney was entitled to.

[1] No bad faith can be predicated on this. The statement that Wadsworth would fight before paying to Lyon fails of the same purpose; beside, it was mere hearsay and not entitled to be received. The same is true of the alleged statement made by plaintiff to Ensign. If the attorney desired to avail himself of it he should have embraced it in an affidavit made by plaintiff. In any event it was not shown that such statement, if made, was brought to the knowledge of defendants. The claim at the foot of the attorney's affidavit, that Wadsworth settled with full knowledge and in fraud of the attorney's lien, is no statement of a fact, nor are there appearing facts to sustain it.

[2] The authorities which should determine this appeal are numerous and conflicting beyond hope of reconciliation. It seems, however, to be established that parties have a perfect right to settle suits, even though the attorney does not give consent, and an executed settlement is binding upon the parties to it (Coughlin *v.* N. Y. C. & H. R. R. R. Co., 71 *N. Y.* 443; Root *v.* Van Duzen, 32 *Hun*, 63).

[3] Previous to the amendment of section 66, Code of Civil Procedure, an attorney's lien only attached to the judgment obtained in the action, but it was broad enough to cover not only taxable costs but any agreed compensation between the attorney and client (Rooney *v.* Second Ave. Ry. Co., 18 *N. Y.* 368).

[4] In the absence of notice of the attorney's lien, a defendant acting in good faith had the right to pay the judgment to plaintiff, and was protected in so doing (Wright *v.* Wright, 70 *N. Y.* 98).

In the above case the court affirmed an order of the general term reversing an order of the special term

which set aside satisfaction of a judgment to allow the attorney to enforce the judgment for his costs and counsel fees.

[5] These cases arose before the amendment of 1879, but, unless the amendment has provided a new remedy for the enforcement of the lien, the doctrine decided possesses as much virtue as though no amendment had been adopted. The lien existed before amendment as well as after, but it did not extend to the cause of action (Wright *v.* Wright, 70 *N. Y.* 98).

[6] The lien to the extent to which it had been carried was quite as effectual before as after the amendment. Section 66 does not in terms declare that such a lien shall exist, even though a *bona fide* settlement be made without notice; it simply says it shall exist as to the cause of action; by enlarging the subject to which it shall apply, it does not change any of the steps which were before necessary to make the lien effectual.

[7] In Jenkins *v.* Adams (22 *Hun*, 600), the general term, first department, upon a claim made that the amendment itself gave the notice, say, "Doubtless it was intended to confer upon the attorney the same rights, with regard to the cause of action, as he had previously possessed with regard to the judgment. Now, it was always the rule that a special interest in the claim and judgment could only be protected by notice. This rule is equally applicable to the new lien upon the cause of action created by the section in question."

[8] In McCabe *v.* Fogg (60 *How. Pr.* 488), the superior court of New York, FREEDMAN, J., held that this amendment did not change the remedy for enforcing the lien from what it had previously been, with the single exception that it was not now necessary to show fraud.

[9] In Tullis *v.* Bushnell (65 *How. Pr.* 465), the general term, New York common pleas, held that the practice was the same as before the amendment.

[10] In Goddard *v.* Trenbath (24 *Hun*, 182), the gen-

eral term, second department, held that a settlement made in good faith would be upheld, the defendant having no notice of the attorney's lien at the time of effecting the settlement.

[11] In Wehle *v.* Conner (83 *N. Y.* 231), Judge FINCH, in speaking of attorney's liens, said: "Until such a lien is asserted by the party to it, the judgments are the property of the plaintiff; without notice of the claim the lien cannot be enforced."

[12] In Williams *v.* Ingersoll (89 *N. Y.* 508), Judge EARLE writes that notice of the existence of the lien is only needful to defeat a subsequent *bona fide* payment made by the debtor (p. 522)—thus clearly implying that where the debtor had in good faith paid, a notice of the lien would be necessary, or he would be discharged from liability.

[13] White *v.* Brady (4 *N. Y. Monthly Law Bul.* 39), holds that where the compensation agreed upon exceeds the taxable costs, notice to the opposite party is needful in order to protect the lien.

[14] *In re* Bailey (4 *N. Y. Civ. Pro.* 140), the attorney was employed to defend an action, and succeeded. After entry of judgment the attorney gave notice of lien. The plaintiff, notwithstanding, paid to the receiver of the defendant, who had become insolvent. On petition by the receiver for leave to obtain the money so paid, the court, denied the petition, holding that the attorney's right to the costs became absolute after notice. The decision was affirmed on appeal. (5 *N. Y. Civ. Pro.* 253).

In several other cases cited and relied upon by appellant, a contrary rule has been established.

[15] Lewis *v.* Day (10 *Weekly Dig.* 49) and Coster *v.* Greenpoint Ferry Co. (5 *N. Y. Civ. Pro.* 146)* arose in the city court of Brooklyn; Justices MCCUE and REY-

* The decision in this case was affirmed by the court of appeals without opinion. 98 *N. Y.* 660.

NOLDS, sitting at special term, decided that the amendment to the Code gave notice of the lien, and that a settlement in good faith, without notice, would not defeat it.

[16] Moloughney *v.* Kavanagh (general term, first department [3 *N. Y. Civ. Pro.* 253]), was a case where an attempt was made to set off a judgment obtained in favor of the defendant against a judgment obtained in favor of the plaintiff, for costs. The attorney for plaintiff claimed a lien upon the costs, which was upheld, the court holding that the judgment awarding the costs only, no notice of lien was necessary to be given. To the same effect is Naylor *v.* Lane (5 *N. Y. Civ. Pro.* 149).

[17] Smith *v.* Baum (67 *How. Pr.* 267), New York city court, special term, holds that the amendment gives notice of the lien which is presumptively the taxable costs, but not necessarily so; if more, it may be determined by the court, and judgment ordered that a settlement did not affect the lien. The court in this case states that questions arising in enforcing attorney's liens make it difficult to dispose of them by any fixed rule.

[18] A careful examination of the cases leads me to the conclusion that the construction to be given the amendment to section 66, is not to change the rule which requires notice to be given of the attorney's lien, at least so far as his lien extends beyond the taxable costs. The weight of authority seems clearly to preponderate in favor of such construction.

The right of the plaintiff to appeal (in the present state of this case) is sharply questioned by the respondents. The point stated is that the plaintiff, having settled, been paid his claim, and having released his cause of action, has now no standing in court; that if the appeal is for the attorney's benefit, he is not entitled to prosecute the action, not having obtained leave of the court for that purpose. That the plaintiff has settled and released his cause of action is not disputed. It is, therefore, difficult to see upon what principle the plaintiff has standing to be

heard. By his own act he acknowledges satisfaction, and when defendant seeks to avail himself of such act, as the law provides, he appeals from the order which gives legal effect to his action. If the law allows plaintiff to appeal in such a case, it is in a somewhat anomalous state. Previous to the amendment of 1879 the practice was quite well settled that the plaintiff was concluded by his [19] release, and if the attorney desired to proceed he should move to vacate the settlement, obtain leave to prosecute the action to enforce the lien, or prosecute a direct proceeding in his name for that purpose (Marshall *v.* Meech, 51 *N. Y.* 140; Rooney *v.* Second Av. R. R. Co., *supra;* Coughlin *v.* N. Y. C. & H. R. R. R. Co., 71 *N. Y.* 443; Pickard *v.* Yencer, 21 *Hun*, 403).

[20] Since the amendment, authorities are not infrequent upon each side of this question. Mr. Justice Barker, in Dimick *v.* Cooley (3 *N. Y. Civ. Pro.* 141, general term, fourth department) has said: "It (the order), was made in the name of the plaintiff, and she had no right to proceed after her consent to a discontinuance. After such settlement, the action could not proceed for any other purpose than to allow the plaintiff's attorney to secure and collect his costs. But without such permission from the court he was not at liberty to move in the action for any purpose. It would be an unwise and dangerous practice, extremely hazardous to the rights of both parties, to allow an attorney to continue the action, after the settlement of the parties, without first obtaining the consent of the court, that he may proceed for that purpose. When such permission is given, it is the duty of the court to direct as to the time and manner, and watch the proceedings and doings of the attorneys so as fully to protect the rights of both parties, and not unnecessarily annoy and embarrass either."

In this case, after the settlement was had, the attorney attempted to obtain judgment in the actions, at special term, and the court not only denied his right to move

therein, but for his presumption directed that he pay personally $10 costs of motion in each action. The law of his case was thus effectually settled.

[21] In Goddard *v.* Trenbath (24 *Hun*, 182), the general term, second department, held that a release of the cause of action constituted a bar to the further prosecution of the action, and that the attorney must first obtain leave of the court to further prosecute the action for the enforcement of his lien.

[22] In Murray *v.* Jibson (22 *Hun*, 386), the general term, fourth department, reversed an order setting aside a settlement as being in fraud of an attorney's lien, holding that the plaintiff could not be relieved from her executed agreement because her attorneys were prejudiced. That where the attorney is the moving party he should be the actor.

[23] In Tullis *v.* Bushnell (65 *How. Pr.* 465), the New York court of common pleas, general term, held that before the attorney can prosecute an action for the enforcement of his lien, after settlement, he should obtain leave of the court for that purpose.

[24] In Smith *v.* Baum (67 *How Pr.* 267), the New York city court held that the settlement is conclusive upon the plaintiff, and, if made before issue joined, the attorney should obtain leave of the court to proceed.

[25] In Coster *v.* Greenpoint Ferry Co. (*supra*), the city court of Brooklyn held that the better practice is for the attorney to obtain leave of the court to proceed.

[26] In La Blanche *v.* Kirkpatrick (8 *N. Y. Civ. Pro.* 256), the court held that the attorney should proceed to enforce the lien in his own name, and not in the name of the plaintiff.

[27] A contrary doctrine to the above authorities is found in Forstman *v.* Schulting (35 *Hun*, 504). The general term, first department, held that it was not necessary for the attorney to first obtain leave of the court to prosecute the action, refusing to follow Goddard *v.* Tren-

bath (*supra*), holding it to be directly in conflict with Wilbur *v.* Baker (24 *Hun*, 24), and Pickard *v.* Yencer (10 *Weekly Dig.*, 271; S. C., 21 *Hun*, 403) that these cases were entitled to most weight as authority. No mention is made of the other authorities which hold the doctrine as laid down in Goddard *v.* Trenbath, or to the former practice.

[28] In Wilbur *v.* Baker there was a fraudulent design to cheat and defraud the attorney out of his costs, and the court held, upon the authority of the Pickard case, that the attorney had the right to prosecute the case to judgment notwithstanding the settlement. It is difficult to see how the authority cited sustains the doctrine claimed for it. That was an action commenced November, 1878, to recover damages for assault and battery; issue was joined therein, and in May following, the attorneys for the plaintiff notified the defendant that they had a lien upon the cause of action for their costs and disbursements, and they would not recognize a settlement made without their consent. In September following, the parties settled, and the plaintiff gave to the defendant a release and receipt for the sum of thirty dollars, acknowledged satisfaction in full of his claim and authorized the entry of an order of discontinuance, without costs to either party as against the other. Upon the receipt and stipulation an order of discontinuance was entered. Plaintiff's attorneys had no notice of these proceedings until the circuit after the settlement, at which they noticed the cause for trial and placed the same on the calendar. On making discovery, plaintiff's attorneys, upon affidavits showing the facts as above stated, and also that plaintiff was insolvent, moved for and obtained an order to show cause why said settlement and order of discontinuance should not be set aside. On the hearing, the court granted the motion setting aside the settlement, stipulation and order of discontinuance based thereon. The plaintiff's attorneys thereupon entered judgment for costs. The defendant

appealed. The general term held that the settlement was clearly in fraud of the attorney's lien, that they had the right to have it, and the order of discontinuance set aside to enable them to continue the action and recover their costs, but that they were irregular in entering judgments for costs. The order of the court was: "Judgment set aside, and order modified so as to permit the plaintiff's attorneys to proceed with the suit in the name of their client notwithstanding the settlement and stipulation." A very different case is here presented from the one which this is cited to sustain. Here the attorney did apply to the court to have the settlement set aside, and when granted nothing stood in the way of proceeding with the action.

What was a bar to proceeding was here removed, and the action stood, as to the attorney, as originally commenced. Such order was the enabling act authorizing them to proceed. Consent was obtained from the [29] court authorizing the attorneys to prosecute, and the general term, in the judgment pronounced, was careful to continue the consent given. It is difficult to conceive of a case where consent is applied for and given, unless this be one. Instead of supporting the doctrine contended for, it is in harmony with the other decisions of the same court upon this subject.

I am convinced, from the authorities cited, and the reason for the rule, that this order should be affirmed, upon both grounds, as herein expressed, with $10 costs and disbursements.

GEBHARD AND ANOTHER, RESPONDENTS, *v.* SQUIER, ET AL., APPELLANTS.

SUPERIOR COURT OF BUFFALO, GENERAL TERM, JULY, 1887.

§ 531.

Account—Practice on failure to serve copy upon demand—Effect of such failure.

Section 531 of the Code of Civil Procedure has not changed the practice as to excluding evidence for failure to serve copy of account as it existed under the Code of Procedure.

Where a party to an action fails to serve a copy of an account, sued upon, but not set forth in his pleading, the proper practice is for the parties seeking such copy to make application to the court by motion to preclude such party from giving evidence on the trial of his demand. The question should be settled before trial, and it is not error to admit evidence of an account notwithstanding a demand for a copy thereof has been made and disobeyed, where an order excluding evidence has not been secured.

Where, in an action for goods sold and delivered, the defendants demanded a copy of the plaintiffs' account and they failed to serve the same, and the sale of the goods was not put in issue nor was any question raised on the trial involving that issue, and it appeared that an itemized account of the plaintiffs' demand could not have availed the defendant,—*Held,* that the plaintiffs' failure to serve a copy of the account did not require the exclusion of proof thereof.

(*Decided July* 19. 1887.)

Appeal by defendants from judgment in favor of plaintiff.

The opinion states the facts.

Frank E. Sickles, for defendants appellants.

Baker and Schwartz, for plaintiffs respondents.

TITUS, J.—The plaintiffs in their complaint allege that

the defendants were copartners, and that between July 2, 1885, and August 31, 1885, he sold and delivered to the defendants certain goods, wares and merchandise which were of the agreed price and value of $486.98. The answer is a denial of the copartnership of the defendants, and it set up as matter of defense, that on July 1, 1885, the partnership then existing between the defendants was dissolved, and that the business of said copartnership was continued by the defendant William E. M. Frecknall, and that the plaintiffs had notice of such dissolution, and that the goods, wares and merchandise mentioned in the plaintiffs' complaint were sold and credit given to the defendant Frecknall. The defendant Parker, only, appears to defend. A demand of a bill of particulars of the plaintiffs' account was made, which the plaintiffs neglected to furnish, and when the cause was on trial, the defendants' counsel objected to the plaintiffs giving any proof of the sale of the goods to the defendants, on the ground that no bill of particulars had been furnished him, of the plaintiffs' account; the court overruled the objection and allowed the plaintiffs to make proof of their claim.

It appears that the only issue tried was the partnership of the defendants at the time the goods were purchased. The jury passed upon that question adversely to the defendants, and gave the plaintiffs a verdict for the amount of their claim. The sale of the goods was not in issue under the pleadings, nor was any question raised on the trial involving that issue. In the light of the facts developed on the trial, it is apparent that an itemized account of the plaintiffs' demand could have availed the defendants nothing, as neither the sale nor the quantity of goods was questioned by them.

The practice as it existed under the old Code has not been changed by section 531 of Code of Civil Procedure (Butler *v.* Mann, 9 *Abb. N. C.* 49; Dwight *v.* Germania Life Ins. Co., 84 *N. Y.* 493).

Under the old Code, the proper practice, in case a party

neglected to furnish a bill of particulars on demand, was to make application to the court by motion to preclude such party from giving evidence on the trial, of his demand. If a party desires to prevent the giving of such proof, he should have the question settled before trial (Kellogg *v.* Paine, 8 *How. Pr.* 329).

This practice has been uniformly pursued by the superior court of New York, and, so far as I am able to learn, by the supreme court.

This is the better practice, as all parties will then know just what facts the evidence will be directed to prove (Dowdney *v.* Volkening, 37 *N. Y. Super.* [5 *J. & S.*] 313; Moore *v.* Belloni, 42 *Id.* [10 *J. & S.*] 184).

I think the judge on the trial of this cause committed no error in allowing the plaintiffs to make this proof, without having first furnished the defendant with a bill of particulars. *

The judgment appealed from should be affirmed, with costs.

MARTIN ET AL. *v.* GOULD.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, MARCH, 1874.

§ 1013.

Reference—When not ordered in action by attorney for professional services.

A compulsory reference cannot be ordered in an action by an attorney to recover for professional services where his bill of particulars consists

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* See as to bill of particulars and copies of account in general, note on Bill of Particulars, 2 *N. Y. Civ. Pro.* 240; also cases referred to in Digest to volumes 1 to 10 of these reports, 10 *N. Y. Civ. Pro.* 337, *et seq.*; and as to questions considered in the opinion above reported, Note on Bill of Particulars, 2 *N. Y. Civ. Pro.* at p. 247; Williams *v.* Fay (N. Y. City Ct. Sp. T.), *Daily Reg.* Aug. 28, 1883.

of but three items of charges, notwithstanding one of them includes several items of services in one matter.

Where numerous items of services were all directed toward the advancement or consummation of a particular object, for which a gross sum is claimed, and none of them were the subject of a specific charge as matter of independent indebtedness, an independent estimate of the value of appropriate remuneration for such items of services, are available only for the purpose of furnishing secondary or indirect evidence for the gross charge of the entire services. However numerous the facts to be proven, they still in their aggregate consist of but a single item to be arranged in the account.

In a case where a compulsory reference may be directed, the ordering of it is discretionary with the court and; where in an action by attorneys for services alleged to have been rendered, many of the services rendered were not within the ordinary scope of an attorney's employment, a reference may properly be denied.

(*Decided March* 3, 1874.)

Motion for reference upon the ground that the trial will involve the examination of a long account.

The facts appear in the opinion.

Augustus F. Smith, for plaintiff and motion.

George Owens and *John Graham*, for defendant, opposed.

Robinson, J.—In this case, which is an action for work, labor and services performed by plaintiffs as attorneys and counsel, the bill of particulars consists of but three items of charges, and the case is clearly not referable unless the last item (being a gross sum of $75,000) can, for the purpose of this application, be deemed resolvable, as matter of account, into the different items of service detailed in the bill of particulars and on which the subject of the gross charge is based and which would necessarily become the matter of separate inquiry on the trial. It has been determined in this case that the item is not an aggregate charge for separate acts and services which in themselves are matters of

distinct estimate or value. A motion has been made in this case for an amendment of the bill of particulars, requiring a statement of the specific value of each service, the plaintiff having on request declined to do so; and this being denied, the general term on appeal affirmed such decision, necessarily regarding the service as continuous and single and constituting an entire item of charge founded upon a gross estimate of the value of all that had been done. This charge, therefore, could not have arisen upon transactions in respect to which there were separate contracts, expressed or implied, such as would arise upon the purchase of distinct bills of goods or on employment in separate matters of service, which would constitute legally distinct items of charge (*Ang. on Lim.* § 148; Secor *v.* Sturgis, 16 *N. Y.* 548, and cases cited).

To establish this item, the different coming and going, writings of letters, consultations, &c., involved in the charge, were all directed toward the advancement or consummation of a particular object, and all such as are specified, were advisedly directed to that end. None were the subject of a specific charge as matter of independent indebtedness; and, whatever estimate of value or of appropriate remuneration may be attributed to any or either of such items of service, it only furnishes secondary or indirect evidence for the establishment or fixing of that of the gross charge for the entire service. Such being the character of the particulars of evidence to sustain the entire claim, however numerous the facts to be proven they still in their aggregate constitute but a single item to be arranged in the account (Swift *v.* Wells, 2 *How. Pr.* 79; Miller *v.* Hooker, 2 *Id.* 171; Freeman *v.* Atlantic Ins. Co., 13 *Abb. Pr.* 124; Sharp *v.* Mayor, &c., 18 *How. Pr.* 213). An examination of the cases referred to by plaintiffs' counsel (Masterton *v.* Howell, 10 *Abb. Pr.* 118; Thomson *v.* Seimer, 40 *How. Pr.* 246) will be seen to hold nothing to the contrary.

The ordering of a reference is in discretion; and, while

I regard the investigation of the merits of an item as to the value of a lawyer's bill peculiarly appropriate for trial before an intelligent referee and member of the profession, the claim founded on it is upon such detailed matter of service, many of which are not within the ordinary scope of an attorney's employment, I regard the subject as more appropriate for investigation by a jury.

Motion denied, with $10 costs to abide the event.

VAN SLYCK *v.* INGERSOLL.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, OCTOBER, 1887.

§ 1013.

Reference—When not ordered, because not involving a long account.

A compulsory reference will not be ordered on the ground that a long account is involved, in an action brought by an attorney to recover for professional services, where a gross amount is claimed therefor, notwithstanding the bill of particulars shows a large number of items of services performed and the answer is a general denial.

Martin *v.* Gould (*ante,* p. 45), followed.

(*Decided October* 21, 1887.)

Motion by plaintiff for an order directing a reference of the issues in this action for hearing and determination.

This action was brought by the plaintiff, an attorney and counselor-at-law, to recover the sum of $47,050, a balance alleged to be due him for professional services rendered the defendant, intermediate December 1, 1886, and March 1, 1887, and for moneys laid out and expended by the plaintiff for and on account of the defendant in and about the performance of such services. Issue was joined

on September 10, 1887, by the service of an answer containing substantially a general denial. The affidavit upon which the motion was made, besides reciting these facts, set forth, "that the trial of the issues joined in said action will necessarily require the examination of a long account on the part of the plaintiff; that, in pursuance of the retainer of the plaintiff by the defendant, this deponent prepared papers, attended to different legal proceedings in court and elsewhere, attended to different matters relating not only to his litigation with Mr. E. Post and another, as shown in the bill of particulars hereinbefore served upon defendant's attorney, but to the interests involved as between himself and his son James H. Ingersoll and one Seymour, and was engaged with other attorneys and parties representing different interests, and advised the defendant in matters relating to the settlement of the said controversy; examined many legal questions regarding the rights of the defendant; prepared and assisted in the preparation of several contracts and assignments; that the items of plaintiff's service are very numerous, and covered several pages in deponent's book of accounts, and the said bill of particulars consists of numerous items of separate and independent charges and credits; that in addition some of the items are made up of a series of services, each of which might have been the subject of a specific charge, and each of which will have to be separately inquired into and determined on the trial; that the trial will not involve questions of law."

Austin E. Pressinger, for plaintiff and motion.

John L. N. Hunt, for defendant, opposed.

Allen, J.—The bill of particulars in this action does not disclose such an account as would justify me in ordering a compulsory reference under section 1013 of the Code

of Civil Procedure (see Martin *v.* Gould, a case similar to this, opinion of Robinson, J., filed March 3, 1874, not reported).*

Motion denied, with $10 costs to abide the event.

In re RATHBURN, Landlord, Respondent, *v.* WEBER, Tenant, Appellant.

Superior Court of Buffalo, General Term, July, 1887.

§§ 2240, 2241, 2243.

Summary proceedings—When affidavit of service of precept, etc., insufficient.

An affidavit of the service of a precept in summary proceedings to recover the possession of real property is insufficient where service is not personally made, if it merely avers service of the precept, without stating whether a copy of section 2241 of the Code of Civil Procedure was indorsed upon it at the time of such service, and a judgment entered upon such proof, must, on appeal, be reversed.

To render a judgment in summary proceedings effectual, all the steps must be carefully taken and all the commands of the statute literally obeyed.

Where a precept in summary proceedings is served other than personally it has no effect unless a copy of section 2241 of the Code of Civil Procedure is indorsed upon it, and no person is bound to obey its mandate notwithstanding it contains all the essentials of a valid precept.

(*Decided July* 19, 1887.)

Appeal from judgment of the municipal court of the city of Buffalo dispossessing the appellant from demised premises for non-payment of rent.

The opinion states the facts.

John C. Hubbell, for tenant, appellant.

Tracy C. Becker, for landlord, respondent.

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* See opinion referred to reported *ante*, p. 45

HATCH, J.—This is an appeal from a judgment of the municipal court of the city of Buffalo, dispossessing a tenant of demised premises for non-payment of rent. The question presented upon this appeal, has been before decided, by this court (Miller *v.* Schmidt, not reported).

Counsel for respondent strenuously insists that the decision is wrong, and in consequence thereof a re-examination of this question has been had. Such examination leads me to the conclusion that the former decision must be upheld, and the judgment appealed from reversed. The question arises upon the sufficiency of the affidavit of service of the copy precept required to be served. The affidavit in question is as follows:

"ERIE COUNTY, CITY OF BUFFALO, *ss.*:

"Maria Rathburn being duly sworn says, That on the 18th day of January, 1887, she served the annexed precept upon John Weber, by delivering a copy thereof at his dwelling-house in the city of Buffalo, where the premises described in said precept are situated, to his wife, Mrs. Weber, a person of about thirty-nine years of age, who resided there, and that, at the time of said service, the said John Weber was absent from his said residence.

MARIA RATHBURN."

Sworn before me this 20th
day of January, 1887.
O. W. VOLGER, Notary Public.

This affidavit appears attached to the precept, upon which is indorsed, among other things, a copy of section 2241, Code of Civil Procedure.

It is noticed that, as far as mere statements go, the affidavit is limited; the affiant says she has served the precept, nothing more.

It, therefore, becomes necessary to inquire what the paper is which the affiant states was served. Section 2238 Code of Civil Proceedure provides for a precept and its contents so far as applicable to this case. It must be as

follows: "The judge or justice, to whom a petition is presented, . . . must thereupon issue a precept, directed to the person or persons designated in the petition as being in the possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioners. . . . The precept must be returnable, not less than three, nor more than five days after it is issued."

Other than this there is no statute which adds to or takes from the contents of a precept issued under this act, either by way of indorsements or otherwise. Having issued the precept, the next step is its service. How shall it be served? Section 2240 Code Civil Procedure, makes answer:

First. "By delivering it to the person to whom it is directed."

Second. If the person to whom it is "directed resides in the city or town in which the property is situated, but is absent, then service may be made by delivering a copy thereof, at his dwelling-house, to a person of suitable age and discretion, who resides there; or if no such person can, with reasonable diligence be found there, . . . then by delivering a copy of the precept at the property sought to be recovered, either to some person of suitable age and discretion residing there, or, if no person can be found there, to any person of suitable age and discretion employed there."

Third. If service cannot be made as above prescribed, then it may be made "by affixing a copy of the precept upon a conspicuous part of the property."

The service made in the case under consideration, if made at all, falls under the second subdivision. When the service is made otherwise than personally, certain other obligations are imposed, which are provided for in section 2241 Code:

First. Upon the person to whom the precept is deliv-

ered, who must without any avoidable delay, deliver it to the person to whom it is directed, if he can be found in the same town or city; or if he cannot be found therein then to his agents, and if neither can be found after the exercise of reasonable diligence, then before the time when the precept is returnable, the person must make a written statement, indorsed thereon, that after the exercise of reasonable diligence, he or she is unable to find either the person to whom the precept is directed or his agent, within the town or city. A person who willfully violates these provisions is guilty of a misdemeanor, and if the person receiving the precept is a tenant, he not only becomes guilty of a misdemeanor, but forfeits to his landlord the value of three years' rent of the premises occupied by him.

Second. Of the person who makes service of the precept the following is required: "A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed." This statute in its nature is not only highly penal, but a willful violation subjects the person to indictment and criminal punishment. Under such circumstances it is hardly necessary to call attention to those authorities which hold that these statutes must be strictly construed and every act required to be done must be literally performed, for under this statute such rule is suggested without authority. It is at once apparent why the section of the Code is required to be indorsed upon the copy served (not the precept). It was evidently intended to bring sharply to his attention the duties which the law then imposed upon him, and thus put him in active motion, and to accelerate his movements, hold up before his view liability to punishment by imprisonment. A home is liable to be broken up, valuable property rights may be snmmarily destroyed, hence the necessity for an active, dilligent effort. All of the steps must be carefully taken, the commands of the statute literally obeyed. Suppose

no notice is indorsed upon the copy precept served, and the person upon whom it was served does nothing to call the attention of the person to whom it is directed to it, although he well knew where he was. Would he be liable for the penalties imposed by this statute? Could he be tried and punished by indictment? Clearly not. His being bound to know the law would not apply, for the law says in this manner you shall call my attention to it, and, until you obey the law, you impose no duty upon me! Without the notice, the copy served is no more than waste paper when served in this manner, and no person is bound to obey its mandate, notwithstanding it contains all the essentials of a valid precept.

The evident policy of the law is to secure notice to be given the tenant of the proceeding, and the presumption arises that such precept, with the notice indorsed thereon, has been delivered to the person to whom it is directed, when the perons to whom it was delivered fails to appear and indorse thereon that the tenant or his agent cannot be found; and this fact, coupled with a proper affidavit of service of the precept, when personally served, and with an affidavit of the proper service of a copy of the precept, with the section of the Code indorsed thereon, confers jurisdiction upon the magistrate to proceed to judgment. Nothing short of this will satisfy the statute. This leads to an inquiry as to the proof required of the service of the precept. It is found in section 2243, Code Civil Procedure: "At the time when the precept is returnable, the petitioners must, unless the adverse party appears, make due proof of the service thereof, showing the time and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence." Due proof of the service requires the service of such paper as the law has provided shall be shown. In this case, the affidavit of service clearly states that affiant served a copy

of the precept—but the notice required to be indorsed upon the copy precept left with a person upon the premises forms no part of the precept; it need never contain it, either by indorsement or otherwise. The copy precept, to be effectual, as we have already seen, must have it indorsed, and "due service" requires not only that the copy be served, but that the notice was, when served, indorsed as the law requires, else it fails. This affidavit falls short of what the statut erequires. The test applied by counsel for respondent is, that the affiant would be liable to an indictment for perjury should it appear that the precept was indorsed (as in this case it is), with the section of the Code, while the copy served was not. Tested by this standard, I think he must fail, for the reason that affiant swears that she served the annexed precept, etc. An examination of the paper annexed shows a precept full and complete, it also shows more, but to that this affidavit is silent. So far as the affiant's affidavit goes, it is an absolute verity. How then, can it be said that she is guilty of perjury? If such is the law, then a person can be convicted of perjury for stating the truth. Suppose that this precept was indorsed with another section of the Code, and the affidavit contained the same statement as here. Could it be seriously argued that she served a copy of the precept, and that upon it was indorsed the section appearing, and that if it did not appear indorsed upon the copy served, that, therefore, the affiant was guilty of perjury? It may be claimed that this illustration is no test, being entirely foreign to the subject matter. But in a legal sense it is just as much a part and lot of the precept as the notice required to be indorsed upon the copy precept served, by section 2241 Code. The reasoning of Judge Grover in People *v.* Matthews (38 *N. Y.* 451), sustains the views here advanced. There is no hardship in this rule; parties can as well make a proper affidavit of service as a proper precept. In this case, the affidavit is defective in not stating that not only was the copy precept served but that the notice required to be indorsed thereon

was there when served. The judgment must be reversed, with costs.

In re Petition, etc., of HENRY LEWIS MORRIS, for leave to account as Trustee, etc.

BOWERY SAVINGS BANK and Another, Respondents, *v.* HAIGH, Appellant.

Supreme Court, First Department, General Term, June, 1887.

§§ 14, 2266 *et seq.*, 2284.

Contempt—When remedy by action and by special proceeding concurrent—Amount of fine—How costs and expenses determined.

Where an order made directed a trustee and a corporation, whichever might be in possession of a certain trust estate, to ascertain and separate from the effects of such a estate the properties belonging to a decedent at the time of her death, convert the same with all convenient speed into cash, pay therefrom a certain claim, and deliver the balance to her administrator,—*Held,* that the trustee, having proceeded in accordance with the mandates of the order and made an adjustment with the company which in effect did separate the trust estate and its assets from the property of the corporation, and having actually received the same, could derive no benefit from the uncertainty in the order as to the obligation to make a separation and payment being upon him or the company; that having, acquired the property, his duty was absolute to comply with the direction of the order for payment.[1]

Where, in such a case, by the failure of a trustee to pay the indebtedness, the creditors are deprived of $9,375.76 and the administrator is deprived of the sum of $2,093.72, the court is warranted in punishing the misconduct of the trustee in disobeying the order in imposing a fine to this extent upon him.[2]

Instance of a case in which a commitment for contempt sufficiently recited that a right or remedy had been impaired, impeded or prejudiced.[3]

A civil contempt may be punished by the imposition of a fine sufficient to indemnify the party for the actual loss or injury proved, when the case is not one where the law specially prescribes that an action may be maintained to recover damages for the loss or injury,[4] and it is not sufficient to protect the party against proceedings and punishment as for a contempt that an action may on general principles be maintained for the same cause.[4]

The statute authorizing the imposition of a fine by way of indemnity for loss sustained by a civil contempt, does not provide for the addition to the amount of the loss, as a part of the fine, of the costs and expenses of the proceedings; [5,7] although it does authorize such addition where the fine is imposed in a case where there has not been any loss or injury established; [5] but in the former case by great liberality of construction, *it seems*, the costs and expenses may be included in the fine.[8]

In fixing the amount of a fine for a civil contempt there is no authority for the allowance of a counsel fee as a part of the expense of the proceeding,[9,13] and no more should be added to the fine where it is imposed by way of indemnity than legal costs and expenses of the proceedings.[13]

Sudlow *v.* Knox, (7 *Abb. Pr. N. S.* 411); [11] People *ex rel.* Woolf *v.* Jacobs (5 *Hun*, 428; aff'd, 66 *N. Y.* 8); [12] Power *v.* Village of Athens (19 *Hun*, 165), [12] followed; Van Valkenburgh *v.* Doolittle (4 *Abb. N. C.* 72), distinguished.[10]

To warrant the allowance of any sum for costs and expenses in a proceeding to punish for contempt, they should be legally ascertained and inserted in the order adjudging the party in contempt before it is entered and the party is committed to prison;[14] it is too late to rectify the proceeding in this respect on appeal.[14]

(*Decided June* 18, 1887.)

Appeal by William F. Haigh from an order adjudging him in contempt in failing to make payments out of certain trust funds pursuant to a former order made in this matter and fining him the amount of the payments so directed to be made and directing his commitment until the payment of such fine.

The order of commitment recited the making of an order requiring said Haigh to make such payments, the service of an order to show cause why he should not be punished for contempt in disobeying the same, the making

of an order of reference on such motion to take proof in regard to the facts and report the same to the court with the opinion of the referee, and the making of such a report with an opinion by the referee that Haigh should be punished for such contempt; ordered that the report of said referee be confirmed in all things, and adjudged that the said Haigh was guilty of the misconduct alleged against him and of a willful contempt; also "that the aforesaid misconduct of said Wm. F. Haigh was calculated to and did defeat, impair, impede and prejudice a right or remedy of the petitioners, the Bowery National Bank of New York and Richard Hamilton as administrator of Eliza V. Haigh, deceased, who were parties to the proceeding in which this application was made. It also adjudged "that through the said misconduct of said Wm. F. Haigh the petitioner, the Bowery National Bank of New York, has sustained loss and damage to the amount of $9,375.76 and interest thereon from July 7, 1886; and that petitioner, Richard Hamilton, as administrator of Eliza V. Haigh, deceased, has sustained loss and damage to the amount of $2,093.42, and interest thereon from July 7, 1886, and that the petitioners have sustained a further loss of $1,250, being the proper costs and expenses of this proceeding." It further ordered and adjudged that said Haigh be fined said amounts, and directed his commitment to the common jail of the city of New York, until the payment thereof.

Other facts are stated in the opinion.

James R. Angel, for Haigh, trustee, appellant.

Before the appellant can be justly adjudged guilty of contempt in disobeying the said order, it must be shown that he was in actual possession of the trust estate. . . . "The proceedings for contempt are *stricti juris* and all the rights of the defendant must be preserved. And no conviction should be had unless upon clear evidence." McComb *v.* Weaver, 11 *Hun*, 272; Van Valkenburgh *v.*

Doolittle, 4 *Abb. N. C.* 72; Fischer *v.* Raab, 81 *N. Y.* 235; Slater *v.* Merritt, 72 *Id.* 268 . . . The order adudging the trustee guilty of contempt is erroneous in law, because it inflicts a greater fine than any amount shown, or attempted to be shown, as coming into his hands. . . A fine cannot be imposed arbitrarily and capriciously; it must have a basis upon proof of damages or injury. Simmonds *v.* Simmonds, 6 *Weekly Dig.* 263; Sudlow *v.* Knox, 7 *Abb. Pr. N. S.* 412; De Jonge *v.* Brenneman, 23 *Hun*, 332; Clark *v.* Benninger, 75 *N. Y.* 344. There is no authority in law or in justice for the infliction of a fine in payment of a counsel fee, although called by the name of "costs and expenses," and committing a person to jail until the same is paid . . . The order herein adjudging the said Haigh guilty of contempt directs that he could be confined in the common jail until Mr. Marvin's counsel fee of $1,000 is paid. This is harsh and oppressive, People *ex rel.* Woolf *v.* Jacobs, 5 *Hun*, 428; 66 *N. Y.* 8; Sudlow *v.* Knox, 7 *Abb. Pr. N. S.* 412. "The costs should be those fixed and allowed by statute, and not those which are usually called counsel fees, which rest in discretion." Matter of Jacobs, 49 *How. Pr.* 378; Albany City Bank *v.* Schermerhorn, 9 *Paige*, 372; Tinkney *v.* Langdon, 60 *How. Pr.* 184; 19 *Hun*, 171. The order herein was probably issued under section 2281 of the Code,—which contemplates that both the order and commitment must specify in what particular respect the rights or remedies of the petitioners have been prejudiced, defeated or impaired by the acts of the accused. This the commitment, notably does not state. It must show the nature of the contempt. The order recites an alleged neglect of duty on the part of the trustee; his refusal to pay the petitioners a sum of money never in his possession; but it nowhere shows how any act of the appellant "was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the petitioners." People *ex rel.* Walters *v.* Connor, 15 *Abb. Pr. N. S.* 433; DeWitt *v.* Dennis,

30 *How. Pr.* 131; Matter of Clark, 2 *N. Y. Monthly Law Bul.* 30.

James R. Marvin, for Bowery National Bank and another, respondents.

Mr. Haigh, in his arguments on motion in this case, has urged his inability to comply with the order of the court. This inability was caused by his own wrongful act, and cannot be urged as an excuse. 53 *N. Y.* 404; 10 *Abb. Pr. N. S.* 97; 6 *Hun*, 267; 13 *Hun*, 368. . . . The court has power to punish Mr. Haigh for his disobedience as for a contempt. No judgment could be entered against him and no execution could issue. He could only be punished by way of contempt. By his misconduct the right and remedy of the petitioners were not only impaired, impeded and prejudiced, but were actually defeated. He was guilty of a disobedience of the lawful mandate of the court. His conviction and imprisonment for a contempt were proper and lawful. *Code Civ. Pro.* §§ 14, 2266, 2281, 2284, 2285; Seaman *v.* Duryea, 11 *N. Y.* 324; Park *v.* Park, 18 *Hun*, 466, 468; aff'd in 80 *N. Y.* 156. He was properly fined in the amount of petitioner's claim, and with all the expense of the proceeding, including counsel fee. 75 *N. Y.* 344; 4 *Abb. N. C.* 72.

Daniels, J.—The proceeding was commenced by the petition of the trustee Henry Lewis Morris for the settlement of his accounts and to be allowed to resign his position as trustee of an estate for the benefit of Elizabeth B. Haigh. By the trust she was entitled to the income of the trust estate during her life. Her husband had made notes upon which she was the indorser, which were held by the Bowery National Bank of New York.

On July 23, 1880, an agreement was made for the management of the affairs or business of the trust by the New York Wire and Wire Rope Company, and the payment by it out of the income of the trust, to the extent of

$11,000, to the bank in satisfaction of this indebtedness. While the proceedings were pending Morris was discharged as the trustee, and the appellant was appointed in his place, and he afterwards acted as such under the trust deed. The company paid upon the notes the sum of $7,119.85 out the of undrawn profits of the trust. It failed after that to make any further payments.

Mrs. Haigh died on January 6, 1881, and Richard Hamilton was appointed the administrator of her estate. In the course of the proceedings a reference was ordered to take and state the accounts of the former trustee and of the trust estate. That reference was executed, and reports made by the referee which, with certain modification not requiring to be noticed were confirmed by the court. It then appeared that there was due to Mrs. Haigh from the trust estate the sum of $17,339.95 less the sum already mentioned, which had been paid to the Broadway National Bank, the balance then appearing being $10,222.81. Out of this balance it was determined that the residue of the indebtedness to the bank should be paid, and an order was made upon the referee's report adjusting the state of the account and to which the appellant was a party. It was directed by the court:

"That the said William F. Haigh, trustee, and the New York Wire and Wire Rope Company, whichever may be in possession of the trust estate, is hereby ordered and directed to ascertain and separate from the effects of the said trust estate the assets and property therein belonging to the said Eliza V. Haigh, deceased, at the date of her death, and to convert the same with all convenient speed into cash, and to pay therefrom the claim of the Bowery National Bank, mentioned in said report, so far as the same may be applicable, and any balance thereof, which may remain after the payment of said claim, he thereupon pay and deliver to Richard Hamilton, administrator of the said Eliza V. Haigh, deceased, intestate." And it was for his failure to comply with this direction that he was

fined by the order from which the appeal has been brought, and afterwards committed to prison.

After such failure, the bank and the administrator of the estate of Eliza V. Haigh presented a petition to the court setting forth the omission of the appellant to comply with this direction, and alleging against him the misappropriation of the moneys applicable under the decree to the payment of this indebtedness, and asking for his punishment for the alleged contempt arising out of such violation of the order of the court. The proceedings were referred to a referee, before whom two different hearings took place, and, by the evidence given upon the hearings, it was made to appear that the appellant had settled with the Wire and Wire Rope Company and had received notes for this balance, together with interest upon it, and had used these notes in the purchase of a majority of the stock of the company. The notes were afterwards paid by the company, which was shown to have been solvent at the time when the settlement took place, but no part of their proceeds was paid either to the bank or the administrator.

The appellant claimed by way of excuse that he was obliged to hypothecate the notes in this manner through an understanding with the officers of the company at the time when they were received, but that has been so far contradicted as to deprive his statement of all weight and effect as evidence. The statement of two of the witnesses is to the effect that the settlement was entirely voluntary, without any condition being exacted on the part of the company that the notes should be used as security for the payment of the purchase price of the stock. The stock itself was not purchased of the company, but from another person having possession of the shares, and claiming and appearing at the time to be their owner. Taking the notes in this manner was not strictly a compliance with the direction of the court, but, as the company was solvent and afterwards paid them, no

injury resulted from this act to either of these claimants. The proceeds of the notes would have supplied the trustee with all the funds that were required to comply with the order and satisfy and extinguish the indebtedness due to the bank, and to pay the balance remaining due to administrator of the estate. And using the notes for another and different purpose, and thereby depriving himself of the power to appropriate their proceeds to these objects, was a violation of so much of the order as has already been mentioned.

[1] It has been objected that the order was uncertain in the obligation which it imposed by reason of the direction being that the trustee, or the company, whichever might be in possession of the trust estate, was ordered and directed to ascertain and separate it, etc. But the trustee can derive no benefit from this uncertainty in the order, for he proceeded according to its mandate and made an adjustment with the company, which in effect did separate the effects of the trust estate and its assets from the property of the corporation. Those effects he in this way actually received, and the assets belonging to the intestate were also included in these notes. And after having proceeded to that extent under the order, and acquiring the property to which it related, he deprived himself from afterwards objecting to this direction as being of too uncertain a character to require him to observe it. When he had proceeded so far and obtained the securities upon which the money was afterwards realized, by which he could have discharged the obligations imposed upon him by this portion of the order, his duty was absolute to comply with its directions for payment. He failed to discharge that duty, and it was for that failure, and after an ample opportunity afforded to him for a hearing, that the fine was imposed upon him for which he has been imprisoned. This fine amounted in the aggregate to

[2] the sum of $11,469.18, and it included no more than the $10,222.81 for which notes were received by

him, and interest upon that amount down to the 10th of January, 1887, when the order imposing the fine and directing his commitment was made. The proof was ample, establishing the fact that the petitioners had sustained loss and injury to this extent by this misconduct of the trustee. There was then remaining unpaid to the bank the sum of $9,375.76, and the balance to the administrator of $2,093.72. They were deprived of these sums by the misconduct of the trustee, and the court was accordingly warranted by section 2284 of the Code of Civil Procedure in imposing a fine to this extent upon the trustee for the violation and disobedience of its preceding order, which at all times after it was made remained in full force and effect.

[3] This order was not deficient in the requisite adjudications that the misconduct of the trustee "was calculated to and did defeat, impair, impede and prejudice a right or remedy of the petitioners," for it contained that express adjudication. And the evidence taken before the referee and contained in the affidavits, together with his report, fully maintained this conclusion of the court. And that was sufficient by way of proof of damages to secure the support of this section of the Code, as well as to comply with the authorities cited upon this subject (Tinkey *v.* Langdon, 60 *How. Pr.* 180; De Jonge *v.* Brenneman, 23 *Hun*, 332; Clark *v.* Binninger, 75 *N. Y.* 344.

[4] This section of the Code of Civil Procedure has authorized the imposition of a fine sufficient to indemnify the party for the actual loss or injury proved, when the case is not one where it has been specially prescribed by law that an action may be maintained to recover the damages for such loss or injury. There is no special provision providing for the maintenance of an action to recover the damages arising in this case. And it is not sufficient to protect the party against proceedings and punishment by way of contempt, that an action may,

on general principles, be maintained for the same cause. It is clearly evinced by this section of the Code, that proceedings by way of contempt and the right to maintain an action may be concurrent, for it has declared that the payment and acceptance of the fine will constitute a bar to an action by the aggrieved party to recover the damages for the loss or injury. To legally answer the proceeding because of the right to maintain an action for damages, it must, according to the preceding portion of the section, be a case where the law has specially prescribed an action as the means of redress. That is not this case, for no special provision has been suggested or found restricting the party to an action in a case of this description. The misconduct of the trustee was such as to include a clear and palpable violation of the direction contained in the order made for the benefit of the petitioners, and it was attended with such a degree of loss and injury to them as will be no more than compensated by the fine which the court imposed upon him.

[5] A more serious difficulty is presented by the appeal arising out of the imposition of the sum of $1,250 upon the trustee by way of costs and expenses. The section of the Code to which reference has been made has not, by its language, authorized such an addition to the fine itself. It has provided for no more, where actual loss or injury may be established, than the imposition of "a fine sufficient to indemnify the aggrieved party." The court has not been directed by anything contained in the section to add to that fine a further amount to defray costs and expenses. That power has been supplied by the succeeding portion of the section, but in the language creating it the authority by this language has been applied only to the class of cases where no actual loss or injury may be shown, and where the court may punish the party in contempt by a fine not exceeding the sum of $250, together with the amount of the complainant's costs and expenses.

[6] In this respect the directions differ from those contained in the preceding law, for that provided for the imposition of a fine by way of indemnity for the actual loss and injury, including also the costs and expenses of the proceedings.

It was further provided where no actual loss or injury might be established, as it has also been by this section of the Code, that there the fine should not exceed $250 over and above the costs and expenses of the proceedings. In the compilation made by the Code, it will, therefore, be seen that a material omission has been made from the statute, as it was enacted and made a part of the preceding law (3 *R. S.* 6 ed. 841, §§ 20, 22).

[7] The power contained in the Code to award costs has not been expressly given as part of, or in addition to, the authority to impose the fine to indemnify the loss or injury. But the power to fine in that case has been expressly limited to the loss or injury caused by the misconduct. It prescribes the extent of the punishment for the act of contempt. And its language delegating that power was so employed in the revised statutes. If a larger signification could be given to its language, then there would have been no necessity for providing, as was then done, that the costs and expenses might be added to such fine.

In forming that statute, this addition was expressly made to it. And that discloses the understanding of the legislature to have been that without it the costs and expenses could not be added to the fine for indemnity. As it was necessary then, it seems to be equally so now, for this section of the Code in providing for the fine by way of indemnity, has so far made use of the same language as was contained in the preceding law.

[8] It may be by great liberality of construction, if that shall be allowable in the class of cases in which a party may be punished for a contempt, that the provision in this section of the Code for costs and expenses should be

extended so far as to include the class of cases provided for by the preceding portion of the section, where actual loss and injury have been produced. There certainly is no good reason why the costs and expenses should not in those cases be added to the punishment of the party in contempt. And perhaps as broad a construction as that should be given to this section of the Code, even at the risk of straining the language used by the legislature. But this case does not require a definite determination of this point, for this authority, if it can be held to exist, has been here exceeded. The objection has been made by the [9] counsel for the trustee that no authority existed for the allowance of a counsel fee, and in that he is supported by the decided cases. It is true that a different view was taken of the provisions of the Revised Statutes concerning the allowance of costs in these proceedings, [10] in Van Valkenburgh *v.* Doolittle, 4 *Abb. N. C.* 72. But in that decision the prevailing authorities affecting this subject were not brought to the attention of the court. If they had been, a different decision upon it must have been made, for it was held by the court of appeals in [11] Sudlow *v.* Knox, 7 *Abb. Pr. N. S.* 412, that a counsel fee could not be allowed as part of the costs and expenses of such a proceeding. And that decision was followed in People *v.* Jacobs (5 *Hun*, 428; [12] affirmed, 66 *N. Y.* 8. And also in Power *v.* Village of Athens, 19 *Hun*, 165, 171). These cases, it will also be remembered, were decided under the Revised Statutes, which contained an express provision allowing the imposition of costs and expenses. But they will be applicable to and determine the effect of this section of the Code, if it shall be construed to have so far preserved the authority of the court as to permit the costs and expenses of the proceedings to be added to the fine imposed by way of indemnity for actual loss or injury.

They certainly, however, will justify no more than that, and that falls very far short of sustaining the

allowance included in the order. To that extent, the trustee has legal ground for complaint. No more in any view should have been added to the fine for the indem-
[13] nity of the parties than the legal costs and expenses of the proceedings. The order should, therefore, be modi fied by reversing so much of it as directs the payment by the trustee of this sum of $1,250.

[14] To warrant the allowance of any sum for costs and expenses they should have been legally ascertained and inserted in the order before it was entered and the trustee was committed to prison. It is too late to rectify that part of the proceeding now, and the order should, therefore, be so far only affirmed as to include the fine imposed upon the trustee. For the non-payment of that, he was properly committed to prison under the authority of section 2285 of the Code of Civil Procedure. For it has directed where the misconduct consists of an omission to perform an act or duty which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine imposed. By the final order, what he is required to do is to pay the fine itself, which will perform the act or duty he omitted to perform, and in which his misconduct consisted. But as the order is affirmed in part only, it should be without costs of the appeal

Van Brunt, P. J., and Bartlett, J., concurred.

WILSON, ET AL., RESPONDENTS, *v.* RYDER, APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM, OCTOBER, 1887.

§ 585.

Arrest—Effect of judgment in favor of defendant upon—When deposit in lieu of bail should be returned.

A judgment in favor of a defendant against whose person an order of arrest has been issued, effectually and finally discharges such order notwithstanding the plaintiff appeals therefrom; and although the judgment is reversed, the order cannot be reinstated upon motion, but a new order may issue.

A deposit in lieu of bail stands also lieu of actual custody of defendant, and, like other species of bail, it is a substitute for the body, and when the corpus is legally discharged, the substitute, which is also only accessory, is discharged.

Upon the recovery of final judgment in favor of a defendant who has been arrested on an order of arrest, and discharged by making a deposit in lieu of bail, the deposit must be refunded to him, and this although the plaintiff has appealed from the judgment.

(*Decided October* 28, 1887.)

Appeal by defendant from an order denying a motion for an order directing the return of a deposit made by him in lieu of bail on his arrest under an order granted herein.

The defendant was arrested under an order of arrest and deposited $300 in lieu of bail. The case was tried, and resulted in a judgment dismissing the complaint; the defendant thereupon moved for an order directing the clerk to refund the deposit (*Code Civ. Pro.* § 585). The court below denied the motion because the plaintiff had appealed from the judgment and given security to stay proceedings; and the defendant appealed.

G. G. Dutcher, for defendant-appellant.

P. C. Talman, for plaintiff-respondent.

McAdam, Ch. J.—The judgment in favor of the defendant effectually discharged the order of arrest, notwithstanding the plaintiff's appeal. The discharge is final, because the defendant cannot be rearrested upon the order of arrest, even if the judgment in his favor is reversed. The court cannot reinstate the order upon motion, although it may, in case of reversal of the judgment, issue a new order (Bowman *v.* Bowe, 40 *Hun*, 489). Chancellor Kent, in Wood *v.* Dwight (7 *Johns. Ch.* 295) said: "When process is once discharged and dead, it is gone forever, and never can be revived but by a new exercise of judicial power." The same principle was declared in People *v.* Bowe (81 *N. Y.* 43; Bowman *v.* Bowe, *supra*).

The deposit stands in lieu of actual custody of the defendant by the sheriff. Like other species of bail, it is a substitute for the body, and, when the corpus is legally discharged, the substitute, which is accessory only, is discharged also. This follows as a logical and necessary sequence. If the defendant had been in actual custody at the time of entry of judgment in his favor, he would have been immediately discharged from confinement. The discharge would have left the defendant as free as if no arrest had ever been made. The final judgment in favor of the defendant contemplated by section 585 of the Code has been rendered, and, in the language of the section, "the sum deposited must be refunded to the defendant."

The order denying the motion for its return must therefore, be reversed, and the application granted, with costs.

Hall, J., concurred.

CRANE *v.* O'REILLY.

CITY COURT OF NEW YORK, GENERAL TERM, OCTOBER, 1887.

§§ 488, subd. 8, 499, 535.

Pleading—When complaint in action for libel does not state cause of action —Practice in such cases where objection first raised at trial.

Where a libel did not necessarily refer to the person suing to recover damages therefor, the complaint must allege in some issuable form that it was intended to be applicable to him, or it must follow the form prescribed by the Code of Civil Procedure and allege that the defamatory matter was published of or concerning him.

Where, in an action against a physician for libel in stating in a certificate of death that the plaintiff's child died of "constructive and contributing negligence of parent," but which did not indicate which parent,—*Held,* that it did not necessarily refer to the child's mother, the father being alive, and that a complaint in an action by the mother to recover therefor, which did not allege that the libel was published of or concerning her, did not state facts sufficient to constitute a cause of action.

(*Decided October* 28, 1887.)

Appeal by plaintiff from a judgment entered by direction of the judge presiding at trial term, dismissing her complaint.

The opinion states the material facts.

Chas. J. Hardy, for defendant appellant.

E. P. Wilder, for plaintiff-respondent.

McADAM, Ch. J.—The action is against the defendant, who is a physician, for libel in filing with the board of health a certificate of the cause of death of the plaintiff's

child, containing the following statement: "And that, according to the best of my knowledge and belief, the cause of death was as hereinafter given: 1. Chief and determining cause. Unknown. 2. Constructive and contributing. Neglect of parent." The words complained of are contained in paragraph 2.

The action was originally commenced in the names of Gregory Crane and Winifred Crane, the parents of the deceased child. The defendant in his answer alleged "that he was called upon by Gregory Crane, one of the plaintiffs, to attend said child, and made one visit thereto, and did prescribe for said child, and that the said Gregory Crane was at such time under the influence of liquor, and he then and still believes that the said Gregory Crane did neglect the said child, and that its death was influenced by such neglect." The certificate imputes "neglect to parent" not parents. The language of the alleged libel, cannot be enlarged by construction. However, in interpreting its intent, it must be assumed, in a case like the present, where both the parents are living, that the author intended one, not both. The defendant in his answer names Gregory Crane as the one intended, and alleges that the certificate was true. Instead of meeting the issue thus squarely presented, the plaintiff's attorney dropped the accused husband from the record, and continued the action in the name of the wife, against whom the answer carefully avoids charging the slightest neglect. If the innocent wife had been dropped from the record and the accused husband had insisted upon continuing the litigation to exculpate himself from the issue tendered by the defendant, we could readily observe the force and propriety of the amendment applied for.

The amendment was made, and, as no one complains of it, we will assume that it was rightfully allowed, and proceed at once to the real question presented by this appeal—to wit, whether the complaint, as amended, states a cause of action. The term "parent," employed in the

alleged libel, when applied to the case of a person whose father and mother are living, involves one of intent as to which parent was charged with neglect; and this question is ordinarily one for a jury to determine. It is an issuable, fact however, and as the term by its ordinary meaning does not include both parents, it is necessary, in an action by either to recover damages, to allege in the complaint that the term was used concerning the one complaining.

In Gidney *v.* Blake (11 *Johns.* 54), and Maybee *v.* Fisk (42 *Barb.* 326), it was held that the words "your children are thieves," "your boys have stolen my coin," applied to all the children or boys of the person designated; that the words were not, therefore vague or indefinite, and that either might sue for the recovery of damages. If the term "parents" had been used in the certificate filed by the defendant, either might have brought suit, for the libel would have sufficiently connected both without the aid of extrinsic matter.

If the words used in the two cases just cited had been "your child is a thief," or "your boy has stolen my coin," and the parent in the one case had several children and the parent in the other had several boys, the cases cited would have presented the question that arises here, and in that instance, just as in the present case, the parent complaining would have to connect himself with the libel by allegations that he was the person referred to therein; for the court could not, in the absence of such an allegation, arbitrarily decide which "child," "boy," or "parent" was the object of the defamation.

In view of this circumstance, it has become a rule of pleading, that if the words employed in a libel do not necessarily refer to the person complaining, he must allege in some issuable form that they were intended to and were understood by others to be applicable to him, or the complaint must follow the form prescribed by the Code and allege that the defamatory matter was

published of "and concerning the plaintiff" (*Code Civ. Pro.* § 555). The pleader has failed to observe either of the forms of pleading in the present case, and the complaint in consequence does not state facts sufficient to give the plaintiff a cause of action. The trial judge rightfully sustained the defendant's objection to the pleading (*Code* § 488, subd. 8; *Id.* § 499). It follows, therefore, that the judgment appealed from must be affirmed, with costs.

HALL and NEHRBAS, J.J., concurred.

KANTROWITZ, APPELLANT, *v.* KULLA, ET AL., RESPONDENTS.

CITY COURT OF NEW YORK, GENERAL TERM, OCTOBER, 1887.

§§ 738, 1278.

Offer of judgment—Effect of, by one of two or more joint debtors—Rule as to construction of statute.

An offer to allow judgment under Code of Civil Procedure, section 738, is but a substitute for the former cognovit by which a defendant who had no defense give to the plaintiff a written confession of the action.

A judgment may be entered on an offer of judgment made by one of two or more joint debtors without affecting or barring the remedy against the other debtors. Section 1278 of Code of Civil Procedure,—providing for the entry of judgment upon confession against one of several joint debtors,—applies to cases in which the judgment is rendered upon an offer.

The law looks to substance, not form, and it regards the thing, not the name by which it is called.

The provision of section 1278 of the Code of Civil Procedure,—authorizing for the entry of judgment against one of several joint debtors upon

confession,—is remedial in its nature, and should be liberally construed to give efficacy, according to its evident spirit and intent.

Effect must be given to the purpose of a statute, though the construction seems contrary to the strict letter of the act; for a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.

(*Decided October* 28, 1887.)

Appeal by plaintiff from order vacating attactment.

The plaintiff sued Jacob Kulla and Abraham J. Kantrowitz as copartners, amd on July 27, 1887, Abraham J. Kantrowitz served an offer to allow judgment to be taken against him in the action for the amount claimed, with interest and costs. On the following day, the plaintiff accepted the offer and entered judgment thereon. Nordlinger and others, subsequent attaching creditors, thereon moved to vacate the attachment obtained by the plaintiff in so far as it affected the joint property of both defendants and the separate property of Krella, the defendant, not included in the offer and judgment. The application was granted and an order made adjudging that the judgment entered against one of the joint debtors barred all remedy by the creditor against the other. From this order the plaintiff appealed.

D. A. Levien, for plaintiff-appellant.

H. W. Mack, for defendant-respondent.

McAdam, Ch. J.—An offer to allow judgment under section 738 of the Code Civ. Pro. is but a substitute for the former cognovit, by which a defendant who had no defense gave to the plaintiff a written confession of the action (*Grah. Pr.* 2 ed. 781). Assuming, therefore, that the offer provided for by Code Civ. Pro. § 738, is practically a written confession by the defendant making it, there is no reason why judgment may not be entered against the one making it without barring the action against the other joint debtor who did not (*Code Civ. Pro.* § 1278).

Prior to the enactment of this section, a judgment against one joint debtor operated to merge the debt in the higher security of the judgment, which was regarded as a bar to any action against the other joint debtors, and this, whether the judgment was recovered by action or upon confession. (Candee *v.* Smith, 93 *N. Y.* 349). Section 1278 was designed to change this technical rule of the common law by permitting one of several joint debtors to confess judgment without impairing the legal remedies of the creditor against the others who do not join in the confession. This section (1278) in our judgment was passed with reference not only to section 1273,—which provides for judgments by confession without action,—but to section 738,—which authorizes a form of judgment by confession "after action," through the medium of a cognovit or offer. There is certainly no cogent reason why the new rule introduced by section 1278 should be limited in its application to "confessions," technically so called, or why it should not be held to embrace "confessions" made through the medium of a cognovit or offer to allow judgment. They are all confessions of judgment authorized by the Code, serve the same purpose, and differ only in name and form.

There is no magical force in the name of a thing, for the law looks to substance, not form. It regards the thing, and not the name by which it is called.

The new provision is remedial in its nature, and should be liberally construed to give efficacy according to its evident spirit and intent. Effect must be given to the purpose of a statute, though the construction seems contrary to the strict letter of the act. (Jackson *v.* Collins, 3 *Cow.* 89; White *v.* Wager, 32 *Barb.* 250; Rice *v.* Mead, 22 *How. Pr.* 445); for a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter (People *v.* Utica Ins. Co., 15 *Johns.* 358).

Properly interpreted, section 1278 of the Code

applies to the case at bar; and, by force of its provisions, the judgment entered against the one joint debtor upon his offer of judgment did not merge the debt or bar the remedy of the creditor against the other debtor not included in the offer and judgment. It follows, therefore, that the order vacating the attachment as to the partnership properly of both debtors and as to the separate interest of the one not included in the offer and judgment must be reversed, with costs.

NEHRBAS J.—[Concurring.]—A strict construction of section 1278 of the Code would undoubtedly exclude judgments entered upon offers after suit bought. But I agree with the Chief Justice that that section, being in its nature remedial, should be liberally construed, and that the maxim "*Expressio unius est exclusio alterius*" should not be strictly applied.

I therefore concur in the opinion of the Chief Justice.

SELIGMAN AND ANOTHER, RESPONDENTS, *v.* FALK, ET AL., APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MARCH, 1887.

§§ 645–648, 650, 651.

Attachmemt—Certificate as to property—Right to examination.

An attachment plaintiff is not bound to accept the certificate of one alleged to be indebted to or to have property of the defendant, where it is not responsive, and unless the court can see that there is at least a fair *bona fide* compliance with the demand made for the certificate, the plaintiffs have a right to an examination.

Whatever is the subject of a levy under an attachment, may be the subject of an inquiry in a proceeding thereunder.

If proof that an alleged debtor of the defendant in an attachment is indebted to, or has property in his hands belonging to such defendant is necessary before an order for his examination will be made on the ground that he has failed to furnish a sufficient certificate, it is sufficiently given where the plaintiff states that he has been informed by those sought to be examined of the existence of the indebtedness or of the property.

The certificate required by the Code to be given by one asserted to be indebted to or have property of the attachment debtor is a general statement specifying the amount, nature or description of the property held, or of the debts or demands owing to the defendant, as the case requires, and if the property sought to be reached is an interest in a copartnership business, and the certificate furnished was to the effect that the interest of the defendant in the firm could not be ascertained until an accounting could be had, or that he had no interest in the firm, or that they had no property of his, *it seems*, that the court would require a more formal proceeding to ascertain the precise nature of the interest.

The interest of a defendant in firm property may be levied upon under an attachment.

(*Decided March* 31, 1887.)

Appeal from an order requiring Isaac L., Zachariah and George W. Falk to submit to an examination "as to the defendants' property, and property interest, held by them or either of them as members of the firm of I. L. Falk & Company, or as individuals."

The material facts are stated in the opinion.

B. F. Einstein (*Townsend, Dyett & Einstein*, attorneys), for the appellants.

Sections 650 and 651 of the Code do not apply to a case where the property sought to be attached is the interest of a partner in the assets of a partnership. A partner is not a debtor of his partner, for the latter's interest in the partnership, nor can a partner, because of his possession of the firm property, be said to hold property of his copartner. "The corpus of the effects"

say the court of appeals, in Menagh *v.* Whitwell, 52 *N. Y.* 146, "is joint property, and neither party separately has anything in that corpus; but the interest of each is only the share of what remains after the partnership debts are paid and accounts are taken." Kent lays it down as elementary that "the interest of each partner in the partnership property is his share in the surplus, after the partnership accounts are settled and just claims satisfied; and it follows that no suit at law can be maintained by one partner against his copartner until a final settlement has been made, and the balance ascertained, and a promise contracted to pay it." 3 *Kent Comm.* 37. And the partnership property is not in the exclusive possession of a partner. But each partner is possessed of the whole. *Id.* Again. The certificate is for the benefit of the sheriff. It is designed to give him information so that he can, as directed by section 655, "collect and receive all debts, effects and things in action attached by him, and for this purpose he may maintain any action or special proceeding in his own name or in the name of the defendant." Lynch *v.* Crary, 52 *N. Y.* 183. It follows that the sheriff can require a certificate only of such things in action as he can collect or receive under section 655. The sheriff cannot reach equitable assets, and therefore cannot maintain an action against the appellants for an accounting to ascertain the extent of the defendant's interest in the partnership property. Thurber *v.* Blanck, 50 *N. Y.* 80; Bowe *v.* Arnold, 31 *Hun*, 256; Connor *v.* Weber, 12 *Hun*, 580. The effect of the order appealed from, however, is to permit the sheriff, under an attachment, to summarily require the appellants to account—to accomplish the very thing that the courts have determined he cannot do by a more solemn proceeding.

Eugene Seligman (*Seligman & Seligman*, attorneys), for respondents.

It is scarcely necessary to cite authorities that the mere giving of a certificate is not sufficient to prevent an examination. The cases are positive that a plaintiff has a right to satisfy himself. In Baxter *v.* M. K. & T. R. R. Co., 4 *Hun*, 630, it was held by this general term, first department, BRADY, DAVIS, DANIELS, JJ., all concurring, that the attaching creditor is not bound to take the statement of the defendant's debtor, but is entitled to the examination. So also LAWRENCE, J., in Glen Cove Manf. Co. *v.* Gotthold, 1 *N. Y. Civ. Pro.* 366. Moreover, Code Civ. Pro. § 651, expressly says an examination may be had if all the facts required to be shown are not fully set forth, and it is not necessary that a certificate should have been refused. Under the authorities, the sheriff is clearly entitled to levy on defendant's interest in the property of the old firm and to take possession of that property, and hold it until the partners show by affirmative proceedings that he has no interest in it. Atkins *v.* Saxton, 77 *N. Y.* 195, opinion of RAPPALO, J., p. 199; Goll *v.* Hinton, 8 *Abb. Pr.* 120; Smith *v.* Orser, 42 *N. Y.* 132; Phillips *v.* Cook, 24 *Wend.* 389.

BRADY, J.—An attachment was obtained against the defendant, who was a member of the firm of I. L. Falk & Co., which was dissolved on the 3d of February of the present year. A certified copy of the attachment was served on the appellants, who were members of the firm as it existed prior to the dissolution and before the defendant had absconded, with the usual demand of a certificate under section 650 of the Code. None having been furnished on the 12th of February, an order was made directing the examination of the other members of the firm as to the property of the defendant, held by them either as members of the firm or as individuals. On the return day of the order for examination the appellants moved to vacate the order, but the motion was denied. It is alleged by Mr. Seligman, one of the plaintiffs' attorneys, that the

plaintiffs have no satisfactory information of the interest of the defendant in the firm or of the defendant's property held by the other members beyond this—namely, that he was informed on the 5th of February by the firm that the defendant's share of its profits for the year terminating November last was $17,000. Mr. Isaac Falk claims to have given a certificate, not having refused to give one, and that neither of the other members of the firm refused to give one. But it appears that a new firm was created after the dissolution, under the same designation, publication of which was duly announced in the newspapers.

The exception taken to the certificate given is that it is disingenuous, for the reason that it is given by the existing firm, and such appears to be the fact. In this certificate they state that they do not owe the defendant anything, and that they have no property whatever in their possession belonging to him, that he is not a member of their firm, but is indebted to them in several thousand dollars. The plaintiffs are not seeking any information of that kind. Their object was to know whether the remaining members of the defendant's firm had any property or money in their possession, and what interest he had in the firm of which he and they were members. There can be no question that the certificate furnished by them was not responsive, and the criticism that it was disingenuous seems, therefore, to be quite justified. The attempt is made on the part of Mr. Falk to disclose the defendant's interest in the firm of which he was a member in the affidavit made by him, but it seems to be incomplete, even if it be regarded as a certificate under the provisions of the section mentioned, for the reason that there is no statement as to the capital of the defendant, which, as very justly suggested by the respondent's counsel, would be a very important item in determining what his share of the assets were. They do not state either how long the firm existed or in what manner it was dissolved. They make extracts, it is true, and state a conclusion of law.

The consequence is that, taking all disclosures made by all the papers submitted on behalf of the appellants, they present a very unsatisfactory statement of the interest of the defendant in the firm of which he was a member. The plaintiffs are not obliged to accept such a certificate. Unless the court can see that there is at least a fair, *bona fide* compliance with the demand made, the plaintiffs have a right to the examination. The attaching creditor is not bound to take the statement of the defendant's debtor, but is entitled to the examination under such circumstances (Baxter *v.* M. R. & T. R. R. Co., 4 *Hun*, 630; Glen Cove Mfg. Co. *v.* Gotthold, 1 *Civ. Pro.* 366).

The Code, by section 651, expressly declared that if it appears to the satisfaction of the court, or a judge thereof, that the certificate is untrue or fails fully to set forth the facts required to be shown, an order to attend and submit to an examination may be made. The right of the sheriff to levy on the defendant's interest in the property of the old firm cannot be doubted (Atkin *v.* Saxton, 77 *N. Y.* 195 199). And whatever is the subject of levy must be the subject of inquiry in proceedings under an attachment.

The learned counsel for the appellant insists that it is a pre-requisite to granting the order for examination that there should be some evidence that the person proceeded against is the debtor of the defendant or a person holding property belonging to him, and that there is no such evidence in the papers. Assuming this to be the case, the suggestion is not sustained by the evidence, because, as we have already seen, it is alleged by Mr. Seligman that he was informed that the defendant's share of the profits for the year terminating November, 1886, was $17,000.

It is also further contended that to compel a certificate in detail of the partnership interests would substantially amount to an accounting. But this view is also erroneous, for the reason that the Code contemplates a general statement, namely, a paper specifying the amount, nature or description of the property held for the benefit of the firm,

or the defendant's interest in the property so held, or of the debts or demands owing to the defendant, as the case requires. If the remaining members of the firm, of which the defendant was one, had certified generally, for example, that the defendant had an interest in the firm, the exact extent of which could not be ascertained until an accounting could be had, or that he had no interest in the firm, or that they had no property of his, a different question would be presented. Under such circumstances, it may be that the courts would require a more formal proceeding to ascertain the precise nature of the interest. But what would be done under such circumstances it is not necessary now to consider, inasmuch as the certificate given was not the one called for; and further, the statements were not as full and explicit as they should have been if made at all.

For these reasons, the order should be affirmed, with $10 costs and disbursements.

Van Brunt, P. J., and Daniels, J., concurred.

PRIOR *v.* HALL and Another.

County Court, Erie County, October, 1887.

§§ 1282, 1290, 1533, 1537.

Partition—When judgment void, because sale ordered where there is a life-tenant—Motion to set aside judgment—Within what time may be made—What are irregularities.

Denial of a motion to set aside a sale in a partition action, on the ground of inadequacy of price, will not bar a subsequent motion to set aside the judgment on the ground that the court had not power to order a sale.

Prior to the amendment of the Code of Civil Procedure, § 1533, in 1887, an action for partition could not be maintained by remaindermen or

reversioners where their interest was subject to that of one holding a particular estate in the land, and an actual partition could not be had without great prejudice to the owners, and the complaint in such an action should be dismissed, notwithstanding the life-tenant or other holder of a particular estate were parties to the action and did not object to a sale.

Where, in an action for partition a judgment was entered in November, 1881, directing the sale of the premises in suit,—*Held*, that the judgment should be vacated on motion of the guardian of an infant defendant, where it appeared that such defendant and the plaintiff were remaindermen, and that there was an outstanding life estate in one of the defendants; and this although such defendant did not object to the judgment and the sale thereunder.

The provision of the Code of Civil Procedure limiting the time within which a motion may be made to set aside a judgment on the ground of irregularities does not apply to a case where the court was without jurisdiction to render the judgment.

"Irregularities" and "errors in fact" defined.

Where a court orders judgment directing a sale in a partition action in a case in which a sale is prohibited by statute because a life or other estate is outstanding, it is not an irregularity or an error in fact, but a jurisdictional defect, and the judgment may be vacated, notwithstanding more than one year elapsed between the time of the entry thereof and the time of making the motion.

(*Decided October*, 1887.)

Motion by guardian of infants to vacate a judgment entered in this action November 17, 1881, which directed a sale of the premises in an action of partition.

The facts appear in the opinion.

Roberts, Alexander & Messer, for guardian and motion.

O. O. Cottle, opposed.

Hammond, Co. J.—At the time of the commencement of this action in 1881, the plaintiff, then a girl about eleven years of age, resided with the defendant Jacob V. Hall, who is the maternal grandfather of both the plaintiff and

the other defendant, who was then a lad residing with friends in the State of Vermont.

The defendant Jacob V. Hall owned a life estate in the premises sought to be partitioned, and the plaintiff and her brother, the other defendant, owned the reversionary interest in said premises.

In the progress of the action, a referee was duly appointed to take proofs of the rights and interests of the parties, and whether the premises could be divided or partitioned between the parties; and he thereafter duly reported that the said premises could not be divided without great loss and prejudice to the parties, and that the same should be sold. The said report was confirmed, and judgment ordered, directing a sale of the premises and distribution of the proceeds in accordance therewith.

Upon the sale which was thus had, the wife of Jacob V. Hall became the purchaser of said premises for the sum of $2,000.

About four years thereafter, a motion was made in this court to set aside this sale on the ground of inadequacy of price, and for fraud on the part of Jacob V. Hall in instituting the proceedings and procuring the sale of the premises to his wife.

That was an entirely different motion from this one, and made upon quite different grounds; that one did not seek to vacate the judgment; its object was to set aside the sale under the judgment, upon the grounds before stated, while this motion seeks to set aside the judgment, upon the ground that it was directly in contravention of the provisions of the statute, as contained in section 1533 of the Code of Civil Procedure; which provision was not referred to upon the argument or decision of that motion, and was entirely overlooked by the court.

That motion was denied, for the reason that a part of the premises had been sold by the wife of Jacob V. Hall, to third parties, who had purchased the same in good faith and had paid full value, and made improvements thereon;

and it was not then apparent how their interests could be properly protected if that motion was granted; but it does now appear that a disposition may properly be made of this motion, which will do no injustice to any one concerned, within the provisions of sections 1292 and 1323 of the Code of Civil Procedure.

Section 1533, before mentioned, at the time of the entry of the judgment in this action, read as follows:

"When two or more persons hold, as joint tenants or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for a partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein. *But in such an action, the property cannot be sold;* and if it appears in any stage thereof that partition cannot be made without great prejudice to the owners, the complaint *must* be dismissed." &c.

This section was amended in 1887,* so that now a sale may be had in such case, if the life tenant consents thereto in writing duly acknowledged, &c.

I think this section, as it stood at the time this judgment was rendered, plainly prohibited it; and the judgment thus rendered in direct violation of these provisions was erroneous, because it expressly appeared that the premises could not be partitioned without great prejudice to the owners, and thereupon the only judgment that could have been properly rendered was to have dismissed the complaint.

Counsel in opposition contends that this construction can only be properly put upon this section when the life tenant is not made a party to the action, and that when the life tenant is a party to the action, as in the case at bar, then a sale may be had under the provisions of section 1537.

I cannot agree with this view of the construction of

* Laws 1887, chap. 683.

these sections. Section 1537 seems only to provide for a case where an heir may maintain an action for partition in the face of a devise to another person, upon alleging and establishing that the apparent devise is void, which is entirely different from the case at bar.

Counsel in opposition also claims that the judgment, having been entered more than one year previous to making this motion, cannot now be set aside for irregularity, by reason of the prohibition contained in section 1282 of the Code of Civ. Proc. On the other hand, it is contended for the infants, that the five years' extension by reason of the disability of infancy provided for by section 1291 in addition to the two years provided for by section 1290 in which a motion may be made "to set aside a final judgment for error in fact, not arising upon the trial," should control in this case, and, therefore, the motion is not barred by the statute.

Irregularity is defined as "the doing or not doing, that, in the conduct of a suit at law, which conformably with the practice of the court, ought, or ought not, to be done" (1 *Bouv. Law Dict.* 748).

"Departure from rule; non-observance of rule; the want of adherence to some prescribed rule, or mode of proceeding, consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner" (1 *Tidd's Practice*, 512).

"Irregularity is the technical term for every defect in practical proceedings. . . It is a comprehensive term including all formal objections to practical proceedings" (2 *Burrill's Law Dict.* 97).

"Error in fact not arising fron the trial," may properly be defined as "some erroneous proceeding concerning the action, affecting some party thereto, and not appearing upon the record."

It does not appear to me that the error in this case was either an irregularity, or an error in fact, such as

contemplated in the sections referred to ; but it is rather a question that goes to the jurisdiction of the court, and hence, one that may be always raised in a proceeding for that purpose.

Here the court rendered a judgment which the statute expressly provided it should *not* render; the court did not dismiss the complaint, when the statute says in such a case "the complaint must be dismissed." The court gave judgment directing the property to be sold, when the statute provides, "but in such an action the property *cannot* be sold."

It may be a serious question whether this judgment, thus rendered in direct contravention of the statute, should not be held to be void. At any rate, there does not seem to be any provision of the statute applicable to this case, which limits the time in which this motion may be made. It does not seem to be reached by either section 1282 or 1290, therefore, is not prohibited by either of them.

The court has an inherent power over its own judgments unless restricted by some rule of law or practice ; and it appears to me, in this case, this power should be exercised, in the absence of any rule prohibiting it.

An order may be entered herein vacating and setting aside the judgment entered in this action on November 17, 1881, and all proceedings therein subsequent to that date ; except said judgment is allowed to stand in all respects, so far as the same affects the property conveyed by Elizabeth A. Hall to the various parties named in the moving papers herein, and referring to some person to be agreed upon by the parties, or appointed by the court upon two day's notice by either party to the other, to take and state the account of said Elizabeth A. Hall of all moneys received and disbursed by her on account of said property, and of all sales made by her of any part or parts of said property, and the price received therefor, and the value of the property retained by her and the rents and profits thereof.

CABOT AND ANOTHER, AS SURVIVING EXECUTORS, ETC., *v.* ENSIGN.

CITY COURT OF NEW YORK, TRIAL TERM, JUNE, 1887.

§§ 501, 542.

Counter-claim—What may be set up as—Amendment.

Where, in an action to recover rent under a written lease executed under seal by the defendant, the answer admitted the cause of action set up in the complaint, but set forth a counter-claim for damages to a corporation, which had, with the knowledge of the plaintiff, occupied the demised premises during the greater portion of the term of the lease, resulting from the delay of the plaintiff in making repairs after damage by fire, pursuant to a clause in the lease,—*Held,* that the facts set forth in the answer did not constitute a counter-claim in favor of the defendants; that if any cause of action existed it was in favor of such corporation, and it only could recover the damages; that there was no process of amendment to pleadings on trial that would bring in as a party an entire stranger to the action, and an amendment of the answer so that it should set up a surrender of the premises to such corporation with the acquiescence of the plaintiff, should not be allowed.

A surrender of a written lease under seal cannot be implied by operation of law from the fact that the plaintiff accepted rent from a third party and allowed it to occupy the premises, but there must be a formal written instrument or oral agreement to that effect.

Coe *v.* Hobby (72 *N. Y.* 141); Kiersted *v.* Orange & Alexandria R. R. Co. (69 *Id.*343) followed.

(*Decided June* 29, 1887).

Motion at trial term that the defendant's answer be amended.

This is an action for the recovery of two months' rent upon a written lease executed under seal by the defendant. The answer admits the lease, and that the rent sued for is due, but sets up a counter-claim, that although the

lease was taken in the name of the defendant, and was executed by him under seal, in his individual capacity, yet the demised premises have been occupied during the greater portion of the term by a corporation known as The National Press Company, which has paid most of the rent; that a fire took place in the demised premises; that plaintiff's intestate did not cause the damage occasioned by said fire to be repaired as quickly as she might have done, although the lease contains the usual fire clause; and that thereby the property and business of said corporation suffered damage, for the amount of which judgment is demanded by way of counter-claim.

The plaintiff moved for judgment on the pleadings, upon the ground that the claim alleged in the complaint is admitted, and that the defendant relied entirely upon his alleged counter-claim.

The defendant moved to amend his answer by setting up a surrender of the lease sued upon, and acceptance thereof by the plaintiff.

Wilbur Larremore, for plaintiff

Sumner B. Stiles, for defendant

Hyatt, J.—The facts alleged in the answer do not constitute a counter-claim in favor of the defendant.

According to section 501 of Code of Civil Proceeding, a counter-claim must be "against the plaintiff and in favor of the defendant, or of one or more defendants, between whom and the plaintiff, a separate judgment may be had in the action."

All the damage alleged was to the business of said corporation, which is a stranger to this action.

Any cause of action which may exist, exists in favor of such corporation; any judgment which could be removed by reason of such damage, would have to be recovered and entered in favor of such corporation; and there is no pro-

cess of amendment to pleadings on a trial, that will bring in as a party an utter stranger to this action.

The defendant seeks, however, to establish such counter-claim by a very radical amendment of the pleadings; he asks to amend his answer by setting up a surrender of the lease sued upon, while conceding that he could not offer, in proof of such alleged surrender of the lease, any written instrument or formal oral agreement to that effect.

His theory is that the plaintiff's testator accepted rent from the said corporation and allowed them to occupy the premises, upon which he would spell out a surrender of the lease by operation of law and the acts of parties.

In the case at bar a surrender cannot be implied by operation of law, there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties (Coe *v.* Hobby, 72 *N. Y.* 141). In the case at bar no new lease, either written or verbal, was made or is alleged.

Assuming, as the defendant claims, that the plaintiff knew, at the time of the making of the written lease, that the defendant intended to allow the said corporation to occupy the demised premises, and that the rent was paid by said corporation, and accepted, yet, within the ruling of Coe *v.* Hobby (*supra*) these facts would be clearly insufficient to make out a surrender by operation of law.

But even if such a surrender were established it could not help the defendant in this action; the difficulty still remains that the alleged counter-claim, if any, is in favor of a stranger to the action—a corporation which could not set up the counter-claim attempted to be established. It arises under a covenant in the lease, which is under seal, and the corporation is not a party to such lease.

In the case of Kiersted *v.* Orange & Alexandria R. R. Co. (69 *N. Y.* 343), the facts were closely analogous to the case at bar. There, as here, there was a lease under seal to an individual, and an occupation of the demised

premises, with a knowledge of all parties, by a corporation. The suit was against the corporation for rent. The court held that the action would not lie; that the covenant in the sealed lease could only be enforced by or against a party to the lease, and that there was no privity of contract or estate between the lessor and such corporation. Under this ruling, the only person who could take advantage of the fire clause in the lease at bar, was the lessee named in it, the defendant in this action; and there is no allegation which goes to show that he has suffered any damage whatsoever.

The allegations of damage are to a stranger; they cannot, upon any theory, be made the basis of a valid counterclaim.

The plaintiff's motion for judgment on the pleadings must be granted, with costs.

DUDLEY, Appellant, v. BRINCKERHOFF, Respondent.

Supreme Court, Second Department, General Term, July, 1887.

§§ 3046, 3068.

Appeal—When county court vested with jurisdiction of, from justice's court—When appellant entitled to new trial in county court—Evidence.

An appeal from a justice's judgment to a county court should not be dismissed on the ground that a new trial is demanded and the case is not one in which the appellant is entitled to a new trial, where the notice of appeal is sufficient and regular in other respects. Such a notice of appeal is sufficient to transfer the cause to the county court and vest it with jurisdiction of the same.

A demand for a new trial in a notice of appeal from a justice's court to a county court does not alone secure that remedy.

An appellant, on appeal from a justice's to a county court, is not entitled to a new trial unless the sum for which judgment was demanded by either party in his pleadings, exceeded $50, and where plaintiff in such an action demanded judgment for less than $50, the defendant set up a counter-claim for $55, and made no demand for judgment, and also served a bill of items for $50; neither party having demanded judgment for a sum exceeding $50, the defendant upon appeal is not entitled to a new trial in the county court.

Where, in an action to recover the value of seed wheat alleged to have been sold and delivered to the defendant, it appeared that the wheat had been charged to the plaintiff's son, and the defendant testified that the accounts of the farm were kept in that way, and the same settled by the defendant once a year, and also, that before the son occupied the house, another man had occupied it, and that the accounts of the farm were kept in the same way,—*Held*, that it was error to permit the plaintiff to show that the accounts for goods furnished before the defendant's son occupied the house were settled by defendant; that the evidence was material as explaining the manner in which the accounts were kept and settled.

(*Decided, July* 1, 1887.)

Appeal by plaintiff from a judgment of the county court of Dutchess county and from an order of said court.

This action was commenced in a justice's court by the plaintiff to recover the sum of $44.16, for wheat alleged to have been sold and delivered to the defendant. The answer of the defendant set up a counter-claim for goods asserted to have been sold and delivered to the plaintiff, amounting to $55. At the time of filing his answer, the defendant, upon demand of the plaintiff, also filed a bill of items of his claim, the aggregate amount of which items was $50. The case was tried before the justice on May 11, 1886, and judgment rendered by him on the 14, day of that month in favor of the plaintiff for $44.16 damages and $4.35 costs.

The defendant appealed from said judgment to the county court of Dutchess county and demanded a new trial, on January 17, 1887, and the plaintiff, before the

trial, moved to dismiss the appeal on the grounds that neither the plaintiff's claim nor the defendant's counter-claim exceeded the sum of $50. The motion was denied, and an order to that effect duly made and entered. The trial then proceeded, and at the close of the plaintiff's evidence the defendant again moved to dismiss the complaint on the ground that no cause of action was made out.

This motion was granted and all requests of the plaintiff to go to the jury were denied, and judgment dismissing the complaint and for $72.24, costs and disbursements, thereafter, on February 3, 1887, entered in favor of the plaintiff. From this judgment, and from the order denying the plaintiff's motion to dismiss the appeal to the county court, this appeal was taken.

M. A. Fowler (*H. H. Hustis*, attorney), for plaintiff, appellant.

The motion to dismiss the appeal should have been granted for the following reasons: First. The plaintiff in his complaint demanded judgment against the defendant for only $45. The defendant set out in his answer a counter-claim against plaintiff for $55; but at the same time, he filed his bill of items claiming only $50 against the plaintiff. Section 3068 of the Code of Civil Procedure provides that "where an issue of fact or an issue of law was joined before the justice, and the sum, for which judgment was demanded by either party, in his pleadings, exceeds $50, ... the appellant may, in his notice of appeal, demand a new trial in appellate court." It is true the defendant set forth a claim in his answer of $55; but he at the same time filed his bill of items limiting his recovery to $50. The bill of items, when filed, becomes a part of the pleading, and the recovery cannot exceed the amount laimed in the bill of items. Melvin *v.* Wood, 3 *Keyes*, 533. The office of a bill of particulars is to limit the generality of a complaint. Drake *v.* Thayer 5 *Robt.*

694. The effect of his bill of particulars was to restrict the proof and limit the recovery or defense to what is stated in it. Stevens *v.* Webb, 4 *N. Y. Civ. Pro.* 64. A bill of particulars has the effect to restrict the proofs and limit the recovery to the matters set forth in it. It is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of it. Bowman *v.* Earle, 3 *Duer*, 691; Dwight *v.* Germania L. Ins. Co., 84 *N. Y.* 493, 506.

Second. A party must set forth in his pleading a claim for a sum exceeding $50, and demand judgment for the same. *Code Civ. Pro.* § 3086. In this case, the defendant does not demand judgment for any amount.

Walter C. Anthony, for defendant-respondent.

Plaintiff's motion to dismiss the appeal was properly denied. If the amount "demanded by either party in his pleadings exceeds $50," the appellant is entitled to a new trial in the county court. The defendant claimed an off-set of $55. His bill of items, it is true, only disclosed a claim of $50. But a bill of items is not a part of the pleadings; it merely makes the statements of the pleadings more definite and certain. Farcy *v.* Lee, 10 *Abb. Pr.* 143; Smith *v.* Hicks, 1 *Wend.* 48, and cases there cited. Even if the defendant was not entitled to a new trial, his appeal could not be dismissed for that cause. He might be limited to an argument of the legal questions presented by the return. Matteson *v.* Hall, 64 *How. Pr.* 515; Harvey *v.* Van Dyke, 66 *Id.* 396.

Dykman, J.—This action was commenced in a court of a justice of peace, where it was tried, and where the plaintiff recovered a judgment for $48.50.

The defendant appealed from that judgment to the county court of Dutchess county, and in his notice of appeal demanded a new trial in the appellate court. Thereupon the respondent moved in the county court to

dismiss the appeal because the sum for which either party in his pleadings demanded judgment did not exceed $50. That motion was denied, and a new trial was had, and the complaint of the plaintiff was dismissed at the close of his case, for a failure to establish a cause of action against the defendant. Now the plaintiff appeals from the judgment entered against him and from the order denying his motion to dismiss the appeal.

The appeal from the order must fail because the appeal was perfected by the service of a sufficient and regular notice of appeal, and nothing more was requisite to transfer the cause to the county court and vest that court with jurisdiction over the same. (*Code Civ. Pro.* § 3046). What the defendant could do in the county court after reaching there with regularity and safety is quite another question.

The demand for a new trial in the appellate court, contained in the notice of appeal, did not alone secure that remedy. The appellant was not entitled to a new trial, unless the sum for which judgment was demanded by either party in his pleadings exceeded $50. By a reference to the pleadings, it is found that the plaintiff demanded judgment against the defendant for $45, with costs; and the defendant answered by denying the complaint and stating a counter-claim for $55, and making no demand for any judgment. Then he submitted a bill of items for $50. Neither party, therefore, demanded judgment for a sum exceeding $50, and the defendant, as a consequence, was not entitled to a new trial in the county court (*Code Civ. Pro.* § 3068).

The case was also overtaken by an error at its final conclusion.

The action was for the recovery of the value of seed wheat, and the direct testimony of the plaintiff was that he sold the wheat to the defendant, M. V. Brinckerhoff, and that it went on his farm, and was taken by his team and his men. Upon his cross-examination, it appeared

that the wheat had been charged to James B. Brinckerhoff, Jr., the defendant's son. Upon his re-direct examination, the plaintiff testified that the accounts of the farm were kept in that way, and the same were settled by the defendant once a year, and this is upon the record:

"Redirect: In former years, before James occupied this house, some other man occupied that house, and the account with the farm was kept in the same way on my books.

"Question. And settled by Matthew V. B. Brinckerhoff? Objected to as immaterial and improper. Objection sustained. Defendant excepts."

The exclusion of this evidence was erroneous. When it appeared that the plaintiff had charged the seed wheat to James instead of the defendant, a burden was laid upon him to explain that apparently inconsistent act. Unexplained, the charge tended to show that the sale was made to James; but if the charge was made in pursuance of a purpose recognized by the defendant to keep the accounts of his farm separately, the proof of that fact was very material, and might well have afforded an explanation which would have been satisfactory to the jury, especially in view of the undisputed fact that the seed wheat was used upon the defendant's farm, and the undisputed testimony of the plaintiff that the sale was made to the defendant.

It appears from the record that the complaint was dismissed upon the ground that no cause of action had been established against the defendant. The plaintiff excepted, and asked permission to go to the jury upon the evidence. That motion was also denied, and the plaintiff excepted. The granting of the motion to dismiss, and the refusal of the permission to go to the jury, were both erroneous. There was evidence sufficient to carry the cause to the jury, and to have sustained a verdict in favor of the plaintiff, if such a verdict had been returned.

The judgment must be reversed, with costs.

Barnard, P. J., and Pratt J., concurred.

OESTERRICHES, Appellant, *v.* JONES et al., Respondents.

Supreme Court, Second Department, General Term, July, 1887.

§ 3232.

Costs—When judgment cannot be entered for those awarded on determining demurrer to pleading.

Costs awarded on determining a demurrer to a counter-claim set up in an answer where other issues remain to be disposed of cannot be assessed or enforced until final judgment is rendered upon the whole issue, and it is error upon such determination to enter judgment for costs.*

Robinson *v.* Hall (35 *Hun,* 214); Armstrong *v.* Cummings (22 *Id.* 570); followed.

(*Decided July* 1, 1887.)

Appeal by plaintiff from an order vacating a judgment on the ground that it was irregularly entered.

The facts are stated in the opinion.

Henry Wehle (*Wehle & Jordan,* attorneys), for plaintiff-appellant.

The irregularity in the judgment, assuming it to exist, called for the correction, not for the vacating of the judgment. The plaintiff is entitled to a judgment: as the costs awarded were awarded absolutely, the judgment as entered is substantially the same in force and effect as an interlocutory judgment. See *Code Civ. Pro.* § 3232.

* See Doelger *v.* O'Rourke, 12 *N. Y. Civ. Pro.* 254, and Note on the Award of Costs on Determining Demurrer where there is also an issue of Fact, 10 *N. Y. Civ. Pro.* 88.

The case of Armstrong *v.* Cummings, cited by the defendant's counsel, arose under a demurrer which was overruled with leave to answer over on payment of costs. The plaintiff proposed to pay those costs by setting off costs which he had recovered in another action against the defendant, and the court simply held that the defendant could not defeat this right of set-off by assigning the costs to a stranger. No judgment had been entered in that case, nor could a judgment be entered in that case.

J. Hampton Dougherty (*Smith & Dougherty*, attorneys), for defendant-respondent.

The order vacating the judgment was proper. No judgment could be regularly entered against the defendant for costs until the entry of the final judgment in the action. Obviously, as there were issues raised by the other defenses in the answer, the action was not in such a condition that judgment could be entered. The precise point of this appeal was decided in Bucking *v.* Hauselt, 9 *Hun*, 633; in Robinson *v.* Hall, 35 *Id.* 214, and in other cases. In Bucking *v.* Hauselt, *supra*, as in this action, the plaintiff demurred to certain counter-claims set up in the answer. Judgment was ordered upon the demurrer for the defendant, who thereupon entered a judgment in his favor for the amount of the counter-claims. Held, that the judgment was irregular and should be set aside; that the case was not in a condition for judgment as long as material issues joined by the answer were left undisposed of. In Robinson *v.* Hall, *supra*, Held: "The issues of law raised by the first and third grounds of demurrer remain undetermined, and, therefore, no final judgment could be entered (*Code Civ. Pro.* § 1021; Masters *v.* Barnard, 6 *How. Pr.* 113; Belknap *v.* McIntyre, 2 *Abb. Pr.* 366; Bucking *v.* Hauselt, 9 *Hun*, 633), and the entry of judgment by defendant for costs was irregular." So in Armstrong *v.* Cummings, 22 *Hun*, 570, it was held that costs awarded upon sustaining a demurrer are not inter-

locutory but final costs, and that the successful party could not recover nor assign them until judgment should be rendered upon the issues in the action generally. Citing Palmer *v.* Smedley, 13 *Abb. Pr.* 185; Mora *v.* Sun Mutual Ins. Co., 13 *Id.* 304. . . . .

The plaintiff sought to maintain his practice by an appeal to section 1220 of the Code of Civil Procedure, but it is manifest that the section does not apply. The operation of the section is limited to cases where an issue of fact arises upon different causes of action set forth in the complaint.

Barnard, P. J.—The complaint is framed to recover damages of the defendants for injuries inflicted by their neglect,—the averment being that they are the owners of a building, a part of which is rented to the plaintiff, and that they opened a place in the roof and carelessly left it unprotected, whereby the rain injured the plaintiff's goods.

The answer took issue upon the facts, and set up a counter-claim. This counter-claim was based upon an averment that the plaintiff had, without defendant's consent, made a structure upon the roof, which was against the city ordinance, and that the defendants were compelled to repair it at an expense of $250.

To the counter-claim the plaintiff demurred and had judgment thereon in his favor. The plaintiffs entered up judgment thereon, with costs. The order at special term set aside this judgment.

The moving papers sufficiently indicated the irregularity. The entry of a judgment while the issues of fact were undisposed of, was given as the reason for the motion, which the plaintiff's attorney says he is advised and believes to be irregular. It was irregular. This was so held in Robinson *v.* Hall (35 *Hun*, 214), where a portion of the complaint was held bad on demurrer.

Judgment was entered thereon, and the court at

special term set it aside as irregular, citing many authorities.

The same thing was held in Armstrong *v.* Cummings (22 *Hun*, 570). The demurrer in this case was to one defense in an answer.

The demurrer was sustained, and the court held that the costs were not capable of assessment. They were interlocutory and not final, and could not be enforced until the final judgment was rendered.

Order affirmed, with costs and disbursements.

Dykman, J., concurs; Pratt, J., not sitting.

PEOPLE *ex rel.* WALLACE, Respondent, *v.* ABBOTT, et al., as Trustees of the School District, etc., in the Town of Gravesend, Appellants.

Supreme Court, Second Department, General Term, July, 1887.

§§ 1931, 2067 *et seq.*, 3244.

Mandamus—When not denied because there is remedy by action—Costs in action against school trustees—Review of determination awarding.

The fact that one applying for a mandamus requiring a public officer to perform a duty, has also a remedy by action, is not a bar to the granting of the writ.

A board of school trustees is a *quasi* corporation.

Where it has been determined in an action brought by a school teacher against the trustees of a school district, that such trustees are indebted to the teacher for salary, and that the trustees have moneys of the district in their hands sufficient to pay the debt, and applicable thereto, a mandamus may issue to compel such payment; and this although an execution may issue against the individual property of the trustees. On such an application, the judgment is final.

Where costs are granted by a judgment, they cannot be assailed collaterally.

Although, by the Code of Civil Procedure, section 3244, costs can only be given in action against school trustees for acts or omissions which cannot be determined on appeal to the State superintendent, if judgment in such an action awards costs against such trustees it cannot be questioned either upon an execution or upon an application for a mandamus, notwithstanding it is erroneous.

(*Decided July*, 1, 1887.)

Appeal from order of the Kings county special term, granting a writ of mandamus directing the defendants to pay a judgment recovered by the relator against them.

The relator commenced an action as plaintiff against these defendants or their predecessors in the county court of Kings county to recover upon a claim for an unpaid balance due him for wages as a teacher in school district No. 6, of the town of Gravesend, and had a verdict in his favor, on March 12, 1884. In July, 1884, the county judge, upon motion of the defendants, ordered a new trial, and the relator herein appealed therefrom to the general term of the supreme court in the second department, which reversed the order of the county court and directed that judgment be entered in the relator's favor in the court below, with full costs, which was thereafter accordingly done. The defendants herein thereafter applied to said general term for leave to go to the court of appeals, and their application was denied with costs. Thereafter, on September 17, 1885, a motion was made by the defendants in the county court, to vacate the judgment as improperly entered and the motion was, on April 17, 1886, denied, with costs ; execution was issued on the judgment against the defendants' property and returned unsatisfied. Thereafter, an application for a mandamus was made and granted.

T. C. Cronin, for defendants-appellants.

The ordinary and usual ways for collection of the

damages should be restored to, and not the extraordinary and forbidden ways urged upon the court in this special proceeding. See People *v.* Coffin, 7 *Hun*, 608; People *ex rel.* Tenth Nat'l Bank *v.* Board of Apportionment, 64 *N. Y.* 627; People *v.* Campbell, 72 *Id.* 496; People *ex rel.* McClelland *v.* Dowling, 55 *Barb.* 197; Clark *v.* Miller, 54 *N. Y.* 528. The law of the State should be followed, and the collection made of the trustees, as is provided by law. *Code Civ. Pro.* §§ 1931, 3244. The section is clear. School trustees are mentioned, and this court cannot disregard that statute.

Orders supplementary to execution, and receiverships, and all other steps must be taken under section 1931 of the Code, and the remedies against all exhausted, before this writ of mandamus can be issued. The remedy to recover the damages included in the judgment entered on June 12, 1885, is by the ordinary ones known to the law, on execution and order supplementary, and not by the writ of mandamus. Legal remedies for the recovery of the damages must be taken, and no mandamus will lie where the remedy is complete on the judgment for damages. People *ex rel.* Ryan *v.* Green, 5 *Weekly Dig.* 544; *Code Civ. Pro.* § 1931.

The certificate of the county judge under the date of April 1, 1886, controls on the question of costs, and no costs of any kind, made and ordered by any court at any time, in any stage of the case, can, under said certificate, be recovered of the defendants as public officers. The certificate of good faith by the county judge at any time, before or after final judgment, in any stage of the case, on appeal, or afterwards, will, and must by law control, and the statute cannot be disregarded or overruled, defied or misconstrued, by any wish or desire to give an attorney costs, which he could have saved the tax-payers, by obtaining the finding and complete decision before the State superintendent of public instruction. See Clark *v.* Tunnicliffe, 38 *N. Y.* 58; People *ex rel.* Yale *v.* Eckler, 19

Hun, 609. The compulsory jurisdiction of the State superintendent of public instruction is complete by statutory requirements, and absolute, and without official excuse by the superintendent. Act of 1864, Consolidated Code of Public Instruction, p. 74, § 7 ; Same act, chap. 174, Laws of 1878.

So apparent is this, so clear, so well-defined by law, and the decisions so strong and decisive, that the unhappy after thought comes into attorney's mind, that it might do to say the superintendent declined to entertain an appeal; but as no record was made of this, and as all the uncontradicted facts showed him and his client's information purely untrue, it was abandoned out and out, and the court below concluded to hold, that the application for the good faith certificate should be made on the trial, and thus save an attorney his costs. See Opinion in printed Case ; *Code Civ. Pro.* § 3244, which is a re-enactment of the old law and statutes. It is clear "costs cannot be awarded to the plaintiff in an action against a school officer."

The construction of the statute as to costs is in disregard of the statute and the decisions under it, and was evidently without a single reason stated, and is founded on some error of fact, as the motion to set aside the irregular judgment is referred to as denied, when that motion, as appears by the record printed herein, and it is without question and dispute, that the question on that motion was simply the irregular consolidation of supreme court and county court costs in one single judgment. This motion had been made several months before, or months before the certificate is dated, and it was adjourned from time to time, until disposed of on April 17, 1886. The judge at special term had evidently been misled by this motion, and it may account for the absolute and unqualified disregard of the law and the cases construing it. Section 3244 applies to all stages of the action against trustees of schools. In point, Willey *v.* Shafer, 1 *Thompson & C.* 324; Rawson *v.* Van Ripper, 1 *Id.* 370. To

simply show how absurd it is to try to avoid the law and misconstrue the law, take the case cited by the court below, in the opinion of People *ex rel.* Yale *v.* Eckler, 19 *Hun*, 609. In that very case, the general term grants $10 costs, and then expressly states that if the certificate of the trial court is obtained thereafter, the costs cannot be recovered of the defendants' trustees because of the statute prohibition cited and relied on by the trustee herein. See Opinion by HARDIN, J.

All the cases are decided by the court of appeals and general term supreme court, and must be followed. . . The general term seems determined to avoid the statute, and to, in open defiance of the express prohibition of the section 3244, hold that costs can be and shall be recovered against the school officers when the statute expressly forbids it by the words "cannot be awarded." . .. That the refusal by the trustees to pay the relator's wages as teacher, is the subject of an appeal to the State superintendent, does not admit of argument, because it is "under color of his office," and an act of omission and refusal on account of his office; and is a "decision" refusing to pay. The judge at special term so held, and cited People *ex rel.* Yale *v.* Eckler, 19 *Hun*, 609. . . .

Tunis G. Bergen, for relators-respondents.

The defendants are public officers, and again and again, since they received notice of the judgment and the demands to provide for paying the same, etc., not only have had sufficient funds on hand, but also power and opportunity to procure the same. The judgment being a charge upon their district by law, they have authority to raise the amount without the vote of a district meeting. See Gen. School Law, *Laws* ch. 1864, 555; R. S. title VII. art. 6, § 51 (Banks' 7 ed.) p. 1168. The language of the statute is general, and nothing to warrant its restriction to any particular class of expenses. Ackerman *v.* Vail, 4 *Denio*, 298. By the Laws of 1885, ch. 411, § 12,

the right of school trustees to assess taxes, etc., was taken away and it became their duty, within five days after each annual meeting, to certify to board of supervisors the amounts lawfully required to be raised, etc., who add the same to general tax; and by section 16, the district collector pays out on the order of the trustees. It further appears that this District No. 6 of Gravesend has further funds from the treasurer of the town from the income of moneys from the common lands equal to $1,000 per annum. *Laws* 1880, ch. 212.

By the stipulation herein, it appears that there is no question of funds in the trustee's hands. By affidavit of Abbott, March 12, 1887, it appears that defendants are now ready and willing to pay the judgment less, the costs. The defendants have raised this question on the certificate of the judge that the defendants acted in good faith. It appears that this certificate was obtained *ex parte* after the judgment had been duly entered in the court below (the county court) on the order of this general term, and after the costs had been duly taxed after hearing and on notice, and after the general term had denied the defendant's application for leave to go to the court of appeals, and after the defendants had applied to vacate the judgment. . .

It is uncontradicted that the plaintiff's costs were duly taxed by the clerk after due notice and hearing, on June 12, 1885, defendants' attorney appearing. . . The costs, therefore, have been duly taxed and entered in accordance with and of the general term, after hearing defendants, and become apart of the judgment; the defendants having made two successive applications which were denied, the costs cannot be attacked collaterally here. The judgment is final and a proper basis for the order granting a mandamus. Certificate was obtained nearly one year after judgment. Section 3244 of the Code reads as follows: "Costs cannot be awarded . . . . against a school officer, etc.,. . . . where his . . . . refusal might have been the

substitute for an appeal to the State superintendent of public instruction, and where it is certified that it appeared upon the trial that the defendant acted in good faith." But in this case the costs have been duly awarded on due notice and hearing, and are *res adjudicata*, not to be disturbed on this appeal. Even if the question of costs was properly before this court in this proceeding (which is denied), the right to prohibit an award of costs depends under section 3244, upon two facts: (1) That the act complained of might have been reviewed on appeal to the superintendent; and, (2) That a certificate of good faith was obtained. Both facts are requisite. The refusal of the trustees to pay Wallace damages for a breach of implied contract would not support an appeal to the superintendent. By title XII. Laws of 1864, ch. 555 (Banks' R. S. 7 ed. p. 1186), § 1, subd. 4, a person might appeal who felt himself aggrieved by trustees paying or refusing to pay any teacher. . . . By section 2 subdivision 1 (same statute) the superintendent has power to regulate the practice on such appeals. By digest of superintendent's decisions on appeals it appears that he will not decide upon questions of contract between teacher and trustees which involve issues of fact as to the terms of such contract, and decides that the courts are the proper tribunals for such controversy. See Code of Public Instruction, ed. 1879, p. 523. It further appears by affidavit that Wallace made application to the superintendent to hear his appeal from the refusal of the trustees to pay him, before he commenced the action, and the superintendent declined to entertain the appeal, and referred him to the courts. Bergen's affidavit of March 18, 1887, is positive. The affidavits of Cronin and Abbott to the contrary are on information and belief. In the case of People *ex rel.* Yale *v.* Eckler, 19 *Hun*, 609, the appeal was from refusal to pay a teacher's wages for part of the time the appellant was a teacher, and his award was for wages in part; so he was properly before the State

superintendent. The cases cited already as to award of costs,—viz.: Clarke *v.* Tunnicliffe, 38 *N. Y.* 58; *Exparte* Bennett, 3 *Den.* 175; Willey *v.* Shaver, 1 *T. & C.* 324; Rawson *v.* Van Ripper, 1 *Id.* 370,—all show the effect of the certificate to prohibit an award of costs before the application was made to obtain a formal award of costs by the clerk. In the case at bar, an application for an order granting a mandamus based upon a judgment twice confirmed after defendant's own applications, the certificate having been obtained after all these proceedings,—viz.: in April, 1886,—is of no effect.

Barnard, P. J.—While it is true that an execution may be issued against the property of school trustees to be collected out of their individual property, it is not the only remedy of the judgment creditors.

The debt is against the school district, and no inability upon the part of school trustees to pay individually will absolve the district from its debt.

The defendants are a board, or a *quasi* corporation, and as such have the money of the district in their hands.

No question is made as to the amount being sufficient and as to the fund being applicable to pay the debt.

The board has no excuse to offer upon this branch of the case why it does not do its duty to the relator.

The facts, therefore, establish mandamus to be the proper remedy. Remedy by action is not a bar to the granting of a writ of mandamus to compel the performance of a duty.

The judgment is final as to the application. Costs were granted by the judgment and cannot be assailed collaterally.

By section 3244 Code Civ. Pro., costs can be given in actions against school trustees for acts or omissions which could be determined upon appeal to the State superintendent. If the trial court determined the question erroneously, it cannot be questioned either upon an execution or upon

an application for mandamus. It appears that the superintendent of public instruction declined to take the question.

There was an issue of fact as to whether the trustee had paid for a year, and the relator was not a teacher after his discharge.

The order should be affirmed, with costs and disbursements.

DYKMAN and PRATT, JJ., concurred.

REED, RESPONDENT, v. REED ET AL.

BERNHEIMER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, OCTOBER, 1887.

§§ 471, 1538, 1557, 1577.

Partition—Action for, cannot be maintained by tenant by the curtesy—Judgment in, bars whom—Remedy of infants where guardian omits to raise objection to jurisdiction—Guardian's bond.

A tenant by the curtesy cannot maintain an action to partition real property in which he has such tenancy; [1] but where he does bring such an action, and it, without objection, proceeds to judgment, and a sale is bad, and the sale confirmed by final judgment, the purchaser will not be released from taking title by the fact that the plaintiff is such tenant by curtesy. [1-6]

A sale in an action of partition which is confirmed by the final judgment is binding and conclusive on all the parties to the action who have duly appeared or have been served in the action and upon their legal representatives. [2]

Cromwell v. Hull (97 *N. Y.* 209; [4] Woodhull v. Little (102 *Id.* 165; [5]

Abbott *v.* Curran (98 *Id.* 665; [5] followed. Scheu *v.* Lehning (4 *N. Y. Civ. Pro.* 385), distinguished. [6]

Every purchaser of real property under a judgment in partition is entitled to a title which will be reasonably free from doubt or dispute. [7]

Where the summons and complaint in an action of partition were served upon infant defendants in the manner required by the Code of Civil Procedure, and a guardian *ad litem* was legally appointed for them the next day after the summons and complaint were so served,—*Held,* that the omission to require a bond from the guardian *ad litem* in favor of each of the infants did not divest the court of the jurisdiction it had acquired over them; [8] that, if a several bond should have been required in favor of each of the infants, the omission to direct it to be given and permitting one bond for their joint as well as for their several benefit was no more than an irregularity which could not be made the subject of objection or complaint by a purchaser at a sale had under a judgment in the action. [9]

Croghan *v.* Livingston (17 *N. Y.* 218), followed. [9]

Where the duly appointed guardian *ad litem* of infant defendants in an action for partition neglects to object to the fact that the action is improperly brought by a tenant by the curtesy, a judgment and sale therein is not rendered invalid. The remedy of the infants is, *it seems,* by action against the guardian to recover damages, if any, sustained by them by a sale and disposition of the property for less than it ought to have brought or less than it would have realized if their title to it, had not been in this manner devested. [3]

An objection by purchasers at a partition sale that the real property bought is subject to a right of sale for the payment of the debts of a decedent is sufficiently answered by proof that such decedent left sufficient personal property to pay all claims against the estate. [10]

(*Decided October,* 1887.)

Appeal from two orders of this court made at special term on September 19, 1887, one denying a motion made by Abraham Bernheimer, the appellant, to be relieved from his purchase of a portion of the lands and premises described in the judgment, and the other directing him to complete said purchase.

Sarah L. Reed departed this life June 7, 1886, seized in fee simple, and possessed of certain lands and premises situate in the city of New York, and in the county of

Westchester, and leaving her surviving her husband, the plaintiff and respondent, and two children, the defendant, Alfaretta Reed and one Florence A. Kearney. The said Florence A. Kearney died intestate on July 31, 1886, leaving her surviving the defendants, Edward Kearney, David Wm. Kearney and Florence A. Kearney, all infants.

This action was brought by the husband of said Sarah L. Reed, as plaintiff, for the partition and sale of the lands and premises whereof said Sarah L. Reed died seized and possessed, in which, at the time of the commencement of this action, all the parties hereto were interested. No other person than the parties to this action had any right, title or interest therein. All the defendants were duly personally served with the summons and copy complaint herein, and Abraham Stern was duly appointed the guardian *ad litem* for all the infant defendants. He interposed on behalf of the said infants a general answer in the usual form, submitting their rights and interests to the protection of the court. The adult defendant did not appear herein.

An order of reference was made to take proof of title and of the facts set forth in the complaint, and to ascertain whether a sale was necessary. The referee reported that the facts alleged in the complaint were true, and that the premises should be sold. Thereupon an interlocutory judgment was entered, confirming the said report, and directing a sale of said lands and premises. Abraham Bernheimer, the appellant, became the purchaser of a portion of said premises, and the referee made report of the sales. The said report of sale and said sales were duly confirmed by a final judgment entered herein. The appellant refused to take title to the premises purchased by him, for reasons the substance of which appears in the opinion. The appellant then moved to be relieved from his purchase, which motion was denied. The plaintiff and respondent moved for an order directing said appellant to

complete his purchase, which motion was granted, and the purchaser appealed from both the orders entered on such determination.*

Edward D. Bettens (*Bettens & Lilienthal*, attorneys), for purchaser, appellant.

The statute (*Code Civ. Pro.* § 1538), forbids the bringing of this action by the plaintiff. As there are infant defendants, can a guardian *ad litem* be appointed for any other purpose than to plead the prohibition in section 1538? The guardian *ad litem*, in his answer, submits the infants' right to the protection of the court. This is, perhaps, tantamount to pleading the prohibition contained in section 1538. Whether this be so or not, it would make no difference, as the court is in duty bound, of its own volition, to enforce that statute when the rights of infants are involved. Where the rights of an infant can be affected, the court is bound to see to it that its judgment does not exceed the power conferred by the statute. If the rights of an infant did not intervene, and the parties were of lawful age, they might make such a mutual agreement for the disposition of the property and the division of the proceeds as would suit their interests, but that would not require the intervention of an action for partition nor the judgment of any court. Scheu *v.* Lehning, 4 *N.*

* The following is the opinion filed by the justice presiding at special term.

LAWRENCE, J.—The case of Tilton *v.* Vail (42 *Hun*, 638), decided by the general term of this department, is a direct authority in favor of the right of the plaintiff to maintain this action; and the case of Cromwell *v.* Hull, (97 *N. Y.* 209) holds that the defect complained of (if it exists) is not jurisdictional, and that a sale made under the decree gives a good title to the purchaser, the decree being binding upon all parties to the action. In this case, all persons interested in the property were made parties to the action, and appeared, either by attorney or by guardian *ad litem* duly appointed. I am, therefore, of the opinion that the motion to discharge the purchaser should be denied, without costs, and that the motion to compel him to take title should be granted, with costs.

Y. Civ. Pro. 385. At first the common-law courts and the court of chancery, each had original jurisdiction of actions in partition; this jurisdiction then devolved upon the supreme court of New York as the successor of these old courts. But the legislature having passed laws applicable to partition actions, the jurisdiction of the supreme court is subject to those statutes, whatever may have been the original jurisdiction of the old common-law courts, and the court of chancery. The supreme court does not necessarily retain the whole of that original jurisdiction. It must act "in conformity with the provisions of the revised statutes." Hewlett *v.* Wood, 3 *Hun*, 736, 738. What the statute directs to be done must be carried out by the court, when infants are parties. Scheu *v.* Lehning, 4 *N. Y. Civ. Pro.* 385. As a rule, the owners of real estate can, by agreement, without applying to the court, have partition. And if partition or sale is sought through the form of an action, although an improper party is plaintiff, the court might not refuse its decree if all the parties consenting are adults. But if the statute prohibits the action or the relief sought, and there are infant parties, the court has no jurisdiction and the purchaser at the sale must be discharged. *Id.* Under that ruling, Mr. Bernheimer is entitled to be discharged from his purchase, as the statute (*Code Civ. Pro.* § 1538) prohibits the bringing of the action by the plaintiff Reed, and the presence of infants defendants prevents a waive, of such prohibition by the parties in interest. The case of Cromwell *v.* Hull (97 *N. Y.* 209) is not a construction of section 1538, nor is it controlling on this appeal. Section 1538 was enacted in 1876, whilst Cromwell *v.* Hull refers to a partition case begun and ended in 1871, nearly five years before the statute was enacted. So such cases as Tilton *v.* Vail (42 *Hun*, 638) by Mr. Justice Lawrence, and Sears *v.* Hyer (1 *Paige*, 433) are not applicable. They were cases in which the plaintiff was a tenant by the curtesy of an undivided part and the defendants had title to the other undi-

vided parts, so that plaintiff and the defendants jointly were tenants in common of the whole estate; but in this case the plaintiff is tenant by the curtesy of the whole estate, and there is nothing left for the defendants except as remaindermen. That is, the plaintiff and defendants in this action together are neither tenants in common nor joint tenants. No case can be found in which the tenants by the curtesy to the whole estate have been permitted to have partition against the objection of the remaindermen, unless Cromwell *v.* Hull be cited as such case; but in that case, no objection to that action was raised in the record itself, nor by any statute; whilst in this case, the objection is raised by section 1538 of the Code, and perhaps by the answer of the guardian *ad litem*, and the court of its own volition is bound to sustain the objection because of the existence of the infant defendants. Scheu *v.* Lehning, 4 *N. Y. Civ. Pro.* 385.

As section 1538 of the Code prohibited the bringing of this action, the court had no jurisdiction sufficient to enable it to appoint a guardian *ad litem* herein. That is, the appointment of the guardian *ad litem* in this case was void. Moreover, section 1538 of the Code of Civil Procedure requires a guardian *ad litem* to file a bond for the infant defendant. As there are three infant defendants, three bonds were necessary, but only one in fact was filed. . . .

The case of Scheu *v.* Lehning, already cited, establishes the right of the purchaser to object to the title on the ground of a fatal defect in the partition suit. A purchaser on a partition sale has a right to expect that he will acquire a good title, and the law presumes that he bids with that object in view. He should not be left, upon receiving a deed, to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which may seriously affect the value of the property if he desires to sell the same. The case should be very plain which would authorize the court. on a motion, to compel a party to take a conveyance, and then it should be determined only with the consent of

such purchaser. Jordan *v.* Poillon, 77 *N. Y.* 518, 521, 553. As a rule, a title which is open to judicial doubt is not a marketable title. Shriver *v.* Shriver, 86 *N. Y.* 575, 584.

John J. Sullivan (*Bailey & Sullivan*, attorneys), for plaintiff-respondent, and *Abraham Stern*, guardian *ad litem*, respondent in person.

The plaintiff had such interest in the real estate as would entitle him to maintain this action. Cromwell *v.* Hull, 97 *N. Y.* 209; Tilton *v.* Vail, 42 *Hun*, 638; Riker *v.* Darke, 4 *Edw. Ch.* 668; Sears *v.* Hyer, 1 *Paige*, 483; *Freeman on Cotenancy and Partition*, §§ 455, 456; Mussey *v.* Sanborn, 15 *Mass.* 155. Notwithstanding the fact that the plaintiff, under section 1538 of the Code of Civil Procedure, was prohibited from being the plaintiff in this action, there having been a judgment and the court having confirmed the sale, the judgment is binding upon all the parties to the action, and gives the purchaser a valid title. Cromwell *v.* Hull, 97 *N. Y.* 209, which is a parallel case in every particular with the one before the court. . . . The action was regularly commenced against the infants by service of the summons and copy of complaint upon them personally. The court thereby acquired jurisdiction over the infants, and the Code of Civil Procedure expressly gives them the right in any action commenced against them to apply for the appointment of a guardian *ad litem*. The judgment is as binding upon the infant defendants as upon the adult defendants. In the case of Cromwell *v.* Hull, cited above, the same rules were applied, there being infant defendants in that action. The appellant is not in a position to attack the judgment as it now stands, if it is erroneous. The only persons who could complain are the parties to the action, and, they not having done so, the purchaser is protected and his title is good. "The order of confirmation of sale in partition is in the nature of a final judgment or decree and

has the force and effect of a judgment which binds the parties where there is complete jurisdiction, whatever errors or irregularities may have preceded it. It cannot be assaulted in collateral proceedings." Woodhull *v.* Little, 102 *N. Y.* 165; Blakely *v.* Calder, 15 *Id.* 617; Abbott *v.* Curran, 98 *Id.* 665; *Civil Code of Pro.* §§ 1557, 1577. The objection that the guardian *ad litem* did not make separate bonds for each of the infant defendants, but made a single bond for all of the defendants together, in the penalty of $500, is unvailing, for the reason that section 1536 of the Code of Civil Procedure prescribes what security shall be given by a guardian *ad litem* for an infant in an action for partition. . . . If, however, the bond given by the guardian *ad litem* was not sufficient, it would be a mere irregularity, and a proper bond could be filed *nunc pro tunc.* It was held, in the case of Croghan *v.* Livingston (17 *N. Y.* 218), that "in an action for partition in the supreme court, as in equity, the omission of the guardian *ad litem* of the infant defendant to file his bond as required by statute is a mere irregularity, which is amendable and does not affect the jurisdiction of the court or the validity of the sale under its judgment." . . .

The main objection urged by the appellant in this matter is the fact that the life tenant was a party plaintiff in this action. We contend that the case of Cromwell *v.* Hull, above cited, is controlling upon that question. A distinction is endeavored to be drawn by the appellant between that case and the one here presented, based upon the fact that the case of Cromwell *v.* Hull passed upon the question presented in an action pending prior to the enactment of section 1538 of the Code of Civil Procedure. In answer thereto we say that there is no such distinction; that section 1538 of the Code introduced no new provision, but was merely declaratory of the law as it then existed, which was precisely similar to the law as it existed under the Revised Statutes. 2 *R. S.* 317, § 1. . . . This section of the Revised Statutes is similiar to section 1532 of

the Code of Civil Procedure; the latter excepting from its provisions the courts in which the action might be commenced; otherwise the two sections are exactly alike. In the case of Cromwell *v.* Hull, the court of appeals assumed the fact and laid down the law to be that prior to the enactment of the Code and under the Revised Statutes a tenant for life could not be a plaintiff in an action for partition. This is declaring the law as explicitly as if it were embodied in a statute. Consequently, the enactment of section 1538 of the Code of Civil Procedure prohibiting such a person from being a plaintiff in an action for partition was no more than declaring what the law was as laid down in that case and in cases therein cited. For that reason, the distinction endeavored to be made by the appellant does not exist.

The court had jurisdiction of the parties and of the subject matter. All persons having any interest in the premises were brought into court. They were personally served with process, and there is no question about the regularity of the proceedings appointing the guardian *ad litem*. The supreme court is one of general jurisdiction at law and in equity, and has jurisdiction of all actions for partition. As no one but the parties to the action can question the purchaser's title, and as they are bound by the judgment, there is no reason why the sale should not be consummated. Blakely *v.* Calder, 15 *N. Y.* 617; Howell *v.* Mills, 56 *Id.* 226; Sullivan *v.* Sullivan, 66 *Id.* 37; and cases cited above. The case of Scheu *v.* Lehning (4 *N. Y. Civ. Pro.* 385) is not in point, and asserts no doctrine in opposition to the views herewith presented. In that case, the action was commenced by one of the remaindermen; the Code of Civil Procedure expressly forbids a sale in such cases, and unless actual partition can be made, directs that the complaint must be dismissed; whereas section 1538 of the Code of Civil Procedure simply declares that no person other than a joint tenant or tenant in common shall be a plaintiff. Section 1533, under which

the above case was decided, did change the law upon the point there presented by expressly prohibiting such sales. See Commissioner's Preliminary Note, article 2, title 1, chapter 4 of the Code of Civil Procedure. In enacting section 1538 of the Code of Civil Procedure no change whatever in the law was made: it is simply declaratory of the law as it always was. Consequently, the case of Cromwell *v.* Hull is controlling. If, however, the case of Scheu *v.* Lehning passed upon the question here presented, it has been overruled by the court of appeals in Cromwell *v.* Hull —since decided.

Daniels, J.—A sale was made under a judgment in partition recovered by the plaintiff, whose interest in the property was that of a tenant by the curtesy. He was forbidden by section 1538 of the Code of Civil Pro-
[1] cedure from being the plaintiff in such an action, and it is mainly for that reason that the purchaser objects to receiving and taking the title under the purchase. But it appears from the case that after the sale was made it was confirmed by the final judgment directed and entered in the action. And when a sale in partition has been confirmed by the final judgment, it has been declared by section 1577 of the Code that it shall be binding and conclusive upon the same persons upon whom final judgment for partition is made binding and conclusive by section 1557 of the Code. And it effectually bars each of those persons who is not a purchaser at the sale from all right, title and interest in the property sold.

The other section here referred to has further declared when the sale may be made by commissioners in partition and confirmed by a final judgment, that it is
[2] binding and conclusive upon the plaintiff, each defendant upon whom the summons was served, and the legal representatives of such parties, and being conclusive as it has been so declared to be, the effect of the final judgment is to ratify and legalize the sale, although it may be

made in an action commenced by a person interested in the property who has not been permitted to maintain it. The object of the law evidently has been, after the sale has been made and confirmed, to deprive the parties to the action of all objections to the regularity and legality of the proceedings in the action, and it has made no exception in this respect in favor even of infant defendants. If the objection had been made by the guardian *ad litem*, as it should have been, that this action was commenced by a person forbidden to institute or prosecute it, that objection would have resulted in its dismissal. But it was not raised or presented to the court in any form what-
[3] ever, and if the interests of the infants in this estate have been in any manner prejudiced, or sacrificed by the omission of the guardian to raise the objection, their remedy will be against him and his sureties in the bond, for omitting to care for and protect them as that might have been done by a reasonable degree of attention devoted to the allegations made in the complaint. If the omission to present the objection resulted from any collusion with the plaintiff in the prosecution of the action he was not entitled to maintain, or from mere oversight, in either event the guardian will be liable to the infants for whatever damages they may have sustained by the sale and disposition of the property, if that has been made for less than it ought to have brought, or than it would had realized if their title to it had not in this manner been divested, and that is the only remedy reserved to them under the provsions of the Code giving this conclusive effect to the final judgment. This effect was given to a judgment in partition by the decision made in Cromwell *v.* Hull (97 *N. Y.*
[ ] 209), and the weight to which that case is entitled in this action is not materially diminished by the fact that the action which was then decided proceeded under the provisions of the Revised Statutes. For in that respect those statutes gave the same effect

to a final decree in partition as these provisions now do, which are contained in the Code (2 *Rev. Stat.* 3 ed. 340, § 84; *Id.* 336, 337 §§ 60, 61).* Under the provisions of those statutes, only a joint tenant or tenant in common was authorized to maintain an action for the partitition of real estate (*Id.* 326, § 1), and that by implication forbade the action to be brought by a tenant by the curtesy as completely, though not expressly, as section 1538 of the Code of Civil Procedure. There is no substantial difference in these statutes, and this decision accordingly is binding upon the parties to this action. And since it was made it has been followed in Woodhull *v.*
[5] Little, 102, *N. Y.* 165. And in principle it is likewise confirmed by Abbott *v.* Curran (98 *N. Y.* 665).
[6] The case of Scheu *v.* Lehning (4 *N. Y. Civ. Pro.* 385) stands no way in conflict with this rule, for there it was not made to appear that final judgment confirming the sale had been rendered. In the absence of such confirmation, the court would not require the purchaser to take the title, who urged the existence of such an objection. For the law entitles every purchaser of real
[7] estate under a judgment in partition to a title which will be reasonably free from doubt or dispute. The summons and complaint were served upon the infant defendants, as that was required to be done by section 426, 427 of the Code of Civil Procedure, and, as they were each under the age of fourteen years, the guardian *ad litem* was legally appointed for them, the next day after the summons and complaint were served, by the court acting under the authority of section 471 of the Code. And the omission to require a bond from the guardian in favor of each of the infants did not divest the court of the
[8] jurisdiction it had acquired over them in this manner. Even if a several bond should have been required in favor of each of the infants, the omission to direct it to be given, and permitting one bond for their joint as well

*2 *R. S.* 318, § 6.

[9] as several benefit, was no more than an irregularity, which cannot now be made the subject of objection or complaint by the purchaser (Croghan *v.* Livingston, 17 *N. Y.* 218). In that case, the court held that the omission to file the bond required was no more than an irregularity which was afterwards amendable by the court. And an offer has been made to correct any irregularity in the form of this bond by executing and filing a bond in favor of each one of the infants if that should be exacted by the purchaser. But he has not insisted upon that being done. He accordingly cannot be relieved from his purchase on account of this alleged defect, even if he should be held right in making the objection.

[10] The objection that there may be creditors of the estate having the right to apply for the sale of the property for the payment of their debts, has been answered by the affidavit of one of the defendants, stating that her mother, who was the preceding owner of the property, left sufficient personal property to pay all claims against her estate.

These are the substantial as well as formal objections urged in behalf of the purchaser in support of his application to be relieved from the purchase, and, as neither of them is legally well founded, it follows that both of the orders from which the appeals have been taken should be affirmed, with $10 costs, besides the disbursements.

Van Brunt, P. J., and Bartlett, J., concurred.

PLATT & WASHBURN REFINING COMPANY *v.* HEPWORTH ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1887.

§§ 500, 537, 1776.

Pleading—When answer frivolous—Motion for judgment on.

On a motion for judgment on a frivolous pleading, affidavits cannot be used. The motion should be determined solely on an inspection of the pleading.

Where, in an action against four defendants, the complaint alleged that they were copartners and set forth a sale and delivery of merchandise to them, an answer by three of the defendants denying a sale "to the above named defendants" does not put in issue any of the allegations of the complaint, and judgment should be ordered thereon on the ground that it is frivolous.

An allegation in a complaint that the plaintiff is a corporation is admitted by failure to affirmatively deny it in the answer.

(*Decided November* 15, 1887.)

Motion for judgment on answer as frivolous.

This action was brought to recover $93.88, the value of goods alleged to have been sold and delivered to the defendants. The complaint alleged that the defendants, of whom there were four, were copartners doing business under the firm name of S. S. Hepworth and Company; that said goods were sold and delivered to the defendants as such firm. Three of the defendants appeared and served a joint answer, in which they did not deny the sale and delivery to the firm.

Other facts are stated in the opinion.

Charles S. Clark, for plaintiff and motion.

William B. Ellson, for defendants, opposed.

Barrett, J.—On such a motion as this, affidavits cannot be used. It is to be determined solely by an inspection of the pleadings. The answer is clearly frivolous. The plaintiff's corporate rights are admitted by the failure, under section 1776, to plead affirmatively. The sale and delivery of the goods by plaintiff to defendants is also admitted. The denial of a sale "to the above named defendants" is no denial of the allegation of the complaint. "The above named defendants" are the three who defend. That is settled by the way the answer opens—"the above named defendants Robinson, Skeller and Colwell," &c. Of course, when these defendants subsequently deny a sale to the above named defendants, they mean these three so above named defendants, and not the defendants named in the caption. The sale and delivery to the latter is thus undenied.

Motion granted, with costs.

GRANT, as Sheriff, etc., and Another *v.* CRITTENTON.

Supreme Court, First Department, New York County, Special Term, November, 1887.

§§ 677 *et seq.*, 3268, 3270.

Security for costs—When foreign corporation required to give.

Where a foreign corporation prosecutes an action in aid of an attachment in its own name and in the name of the sheriff to whom the

attachment was issued, it may be required to give security for costs.

Section 3270 of the Code of Civil Procedure,—providing that a non-resident plaintiff cannot be required to give such security, unless the defendant is entitled to require it of all the plaintiffs,—does not apply, where, as in such case, the sheriff is a mere nominal party, not liable for costs.

(*Decided November* 14, 1887.)

Motion by defendant that plaintiff be required to give $250 security for costs.

This action was brought by the Pioneer Press Company, a foreign corporation, in the name of itself and of Hugh J. Grant, sheriff of the city and county of New York, for its own benefit, and by its own attorney, in aid of an attachment issued to said sheriff at its instance. Before the commencement of the action, permission to bring it in this form was granted, pursuant to sections 677 and 678 of the Code of Civil Procedure, on application of said corporation.

Henderson & Treadwell, for defendant and motion.

G. H. Seixas, for plaintiffs, opposed.

Barrett, J.—Section 3270 is not applicable to a case of this kind, where, under section 677, the sheriff is a mere nominal party, not liable for costs, and where the creditor alone brings and maintains the action, appearing by his own attorney and being alone liable for costs.

The motion must be granted.

HIRSCHSPRING *v.* BOE.

City Court of New York, Special Term, November, 1887.

§§ 738, 3253.

Offer of judgment—Costs recoverable, when offer not accepted—Allowance.

The right of a party to costs is to be determined as of the time of trial.

Where a defendant in an action makes an affer to allow judgment to be taken against him, which is not accepted, and thereafter the plaintiff recovers a judgment which is not more favorable than the offer, the plaintiff is entitled to costs up to the time of the offer, and the defendant to costs thereafter; and the court may grant the defendant an extra allowance.

Where the defendant in an action becomes entitled to costs by reason of having made an offer of judgment which was not accepted, the court may grant him an extra allowance, and the exercise of its discretion by the court cannot be reviewed by the clerk on taxing costs. If an allowance is made, it is a proper item to go in the judgment, and cannot be omitted by the clerk.

(*Decided November* 21, 1887.)

Motion by defendant for a new taxation of costs.

On December 3, 1886, the defendant duly offered to allow judgment to be taken by the plaintiff in this action against him for the sum of $43.75, and interest thereon from October 1, 1884. This was not accepted, and the case went to trial; and the plaintiff had a verdict in his favor $51.01. The offer of judgment at the time it was made, with interest added, amounted to $49.53, and at the time of its acceptance, with interest added, to $51.95, being 94 cents more than the amount recovered by the plaintiff.

The court granted the defendant an extra allowance, which the clerk refused to tax, and thereupon this motion was made.

George H. Foster, for defendant and motion.

Ullo, Ruebsamen & Hubbe, for plaintiffs, opposed.

McAdam, Ch. J.—The plaintiff has recovered $51.01, and would have been entitled to full costs but for the offer of judgment. The right of parties to costs is determined as of the time of trial. For example: If a plaintiff sues for $49, he is not entitled to costs, but if a defense is interposed, and the claim, with interest added to the time of trial, aggregates $50, and the plaintiff has a recovery for that amount, he is entitled to a full bill of costs. Upon this principle, and in the light of section 738 of the Code, the plaintiff became entitled to $15 costs up to the time of the offer, and the defendant to the costs thereafter (Burnett *v.* Westfall, 15 *How. Pr.* 430; Magnin *v.* Dinsmore, 46 *Id.* 297; S. C., 15 *Abb. Pr. N. S.* 331). As to the allowance, the case of Magnin *v.* Dinsmore (46 *How. Pr.* 197) decides that where, after issue joined, the defendant serves an offer to allow judgment, and plaintiff fails to obtain a more favorable recovery, the defendant is not entitled to an allowance. If this decision denies the power of the court to grant an allowance where an offer has been made and rejected, it cannot be approved. There is nothing in section 3253 of the Code that imposes any such limitation of power, nor is there anything in Penfield *v.* James (56 *N. Y.* 650) that necessarily implies such a limitation. If the offer is not made until the issue is nearing trial, that circumstance may have its influence on the question whether an allowance ought be granted to the defendant, because his right to costs commences to run only from the offer is made (*Code, Civ. Pro.* § 738).

In this case an allowance was granted; the court h[illegible]

the power to award it (Board of Pilot Commissioners *v.* Spofford, 3 *Hun*, 52, 59), and the clerk could not review the exercise of discretion by the court ; so that the allowance is a proper item to go in the judgment. The clerk will be directed to retax in accordance herewith.

DYETT, Survivor, etc., *v.* SEYMOUR et al.

Supreme Court, First Department, New York County, Special Term, November, 1887.

§§ 803 *et seq.*, 870 *et seq.*

Inspection of books etc.— When ordered—Examination of party before trial— When directed.

An assignee of a claim occupies no better position on a motion for a discovery of books and papers, or for an examination of a party before trial in an action brought by him on the claim, than his assignor would if he were plaintiff.

A party cannot have an examination of a defendant nor an inspection of his books to prove matters within his own knowledge or within the knowledge of his assignor.

In an action brought against a stock-broker to recover moneys alleged to have been obtained from the plaintiff's assignor by falsely representing to him that the defendant had made purchases and sales of stock for his account which had resulted in a loss, when, in fact, no such purchases or sales were made, but the defendants merely charged the assignor with fictitious losses, the plaintiff cannot have an inspection of the books and papers of the defendant and an examination of the defendant before trial to show the orders given by the assignor, the notices of execution which he received, the representations made to him and his payments, as the assignor is presumed to know such facts, unless it appears by the assignor's affidavit that he has lost the notices of purchases and sales furnished him by the defendants or does not remember the names of the respective vendors and vendees stated therein; and this prerequisite cannot be dispensed with

because the assignor has fled the jurisdiction of the court to avoid criminal prosecution.

In such a case it is error to suppose that the defendants owe any duties to the plaintiff, he not being their customer but merely the assignee of a cause of action charging them with fraud, and they should not be required to furnish evidence against themselves unless a perfecily clear cause under the rules and authority is made out.

(*Decided November* 16, 1887.)

Motion by plaintiff for an order requiring the defendants to permit the plaintiff to inspect and make copies of all books, papers and documents in their possession or under their control, containing records of transactions or dealings of the defendants with John C. Eno, between January 1, and May 15, 1884, in stock or in regard to stock, or the purchase and sale thereof or dealings therein; also, application for an examination of the defendants as parties before trial as to matters in issue in this action.

This action was begun on June 29, 1886, by the present plaintiff and one Norton against the above named defendant. Said Norton departed this life on February 8, 1887, and the action was continued by the present plaintiff as his survivor. The action was brought by the original plaintiffs as assignees of John C. Eno, to recover upon two causes of action, the sum of $450,512.50. The affidavit upon which the examination before trial is sought states that the grounds upon which the plaintiffs seek to recover, are as follows: "That in 1884, the defendants were brokers in the city of New York; that at divers times between January 1, and May 15, 1884, John C. Eno directed the defendants to buy for him various amounts of stock of different kinds aggregating 43,900 shares; the defendants to pay for said stock and to hold the same as security for the purchase money advanced, until otherwise ordered by said Eno; that the defendants stated to said Eno that they had purchased said 43,900 shares (from time to time as various lots were purchased) and had fulfilled

said instructions, and said Eno believed and relied on said reports and statements; that, believing and relying on said reports and statements, said Eno from time to time directed the defendants to sell the stock so reported to him to have been bought by them, and that the defendants stated to said Eno that they had sold the same, and the whole 43,900 shares thereof; and that the aggregate realized on said sale was less by the sum of $160,160 than the amount which the defendants had stated was paid for the same; and the defendants also stated to said Eno that he was indebted to them in the sum of $7,752.50, as and for their commissions upon the purchases and sales; that said Eno, believing and relying upon said statements, and believing that the defendants had bought and sold said stocks as alleged by them, and had earned said commissions, at divers times prior to May 5, 1884, paid to the defendants said sum of $160,160, for losses, and the said sum of $7,752.50, for commissions, being an aggregate of $167,912.50; that said reports and statements of said defendants were false and fraudulent, and known to the defendants to be so, and were made with intent to deceive and defraud said Eno, and that the defendants did not make said purchases or sales or earn said commissions; that, before this action was begun, said Eno duly assigned to Arthur Dyett and Abraham R. L. Norton, all his claims, demands and causes of action against the defendants arising out of the premises and said facts, of which assignment the defendants had notice. This is the first cause of action. The second cause of action is that between January 1, and May 15, 1884, said Eno directed the defendants as his brokers to buy and sell for him 7,500 shares of the Union Pacific stock, and to pay for the same and hold said stock as security for their advances; that on divers day between February 19, and May 7, 1884, defendants represented to said Eno that they had bought for him, as his brokers, divers and different amounts of said Union Pacific stock aggregating 7,500 shares at various prices

but for the aggregate sum of $603,225 for 7,500 shares; that on May 2, 1884, the defendants requested said Eno to take away said stock and to pay them for the sum, to wit, $603,225, and to pay them their commissions of $937.50, in the aggregate of $604,162.50; that on said May 2, the market value of said stock had declined to $60.25 a share, and was worth $151,350 less than the sum which as aforesaid the defendants stated to said Eno that they had paid for them; that said Eno believed all said statements of the defendants to be true, and relied on them, and, so believing and relying, he paid the defendants said sum of $603.225, and $937.50, for commissions, and took said stock; which said stock the defendants, never having bought it for said Eno, borrowed or otherwise procured for the purpose of delivering to him; said Eno held said stock for eleven days (that being a reasonable time), and then the stock having declined to $43 per share, he was compelled to sell (to save himself from further loss) and did sell the whole 7500 shares for $43 per share; and the loss by said Eno, in and by means of said premises, was $281,662.50; that the above mentioned statements and representations of the defendants were false and fictitious and known to be so, and were made by them with intent to deceive or defraud said Eno, and that said Eno did believe them to be true, and acted on them; that the defendants never bought said 7500 shares or any part thereof for said Eno, or earned or became entitled to any commissions in the premises; that after said Eno discovered the falsity of the statement by them set forth, he duly assigned to Arthur Dyett and Abraham R. L. Norton . . . . all his claims, demands and causes of action against the defendants arising out of the above stated facts, of which assignment the defendants had notice, and which assignment was before the beginning of this action."

The answer of the defendants is substantially a general denial of the making of any false statement and of the reliance of said Eno upon any statements made by them.

The affidavit to procure an order for the defendants' examination before the trial also stated that the plaintiff had no personal knowledge of the dealings between said Eno and the defendants, and that said "Eno is now residing in Canada and will not return to the State for fear of prosecution by the public authorities; therefore he cannot be produced as a witness on the stand, and his testimony can be taken, if at all, only by the very insufficient method of a commission"; and that the defendants are the only persons having knowledge of and who could prove the allegations as to the falsity of the representations and the amount of the actual losses, purchases and sales made in such transaction. The affidavit to procure the order for discovery set forth (beside the facts above stated) that it would be necessary "for the plaintiff to prove what orders were given by said Eno to the defendants; what reports or settlements the defendants made to said Eno as to the execution of said orders; what payments Eno made and what other acts he did in consequence of and in reliance on said statements, and whether defendants did the things so stated or reported by them, and whether they bought or sold said stock as so ordered, and at what prices"; that "the defendants' books and papers would naturally contain, and the plaintiff was informed and believed that they did contain "records of most of said facts." These two motions were heard together.

Francis C. Barlow and *Robert G. Ingersoll* (*Townsend, Dyett & Einstein*, attorneys), for plaintiff and motion.

Joseph H. Choate (*Evarts, Choate & Beaman.* attorneys), for defendants, opposed.

Barrett, J.—Plaintiff, as assignee of the causes of action, occupies no better position on these motions than would Eno if he were plaintiff. Eno could not claim an examination of defendants nor an inspection of their books, to prove matters within his own knowledge,—*e. g.*, the

orders he gave, the notices of execution which he received, the representations alleged to have been made, and his payments. This is an action for damages sustained by the defendants' alleged fraud. The gist of the action is that the defendants neither bought nor sold the various shares as directed by Eno and as reported to him, but simply charged him with fictitious losses. Neither Eno nor the plaintiff, on the papers now presented, requires an examination of the defendants or an inspection of their books to prove these charges; that is, if the charges are honestly made. Eno knows what the transactions between himself and the defendants were. At all events, such is the fair presumption, and the plaintiff shows nothing to the contrary. If the purchases and sales were shown, the plaintiff has only to call the persons named in the notices of such purchases and sales furnished from time to time by the defendants to Eno; if Eno has lost these notices, or has failed to keep copies of them, or does not remember the names of the respective vendors and vendees stated therein, the plaintiff should have established such fact by Eno's affidavit or deposition. These pre-requisites cannot be dispensed with because Eno has fled the jurisdiction and is not here to substantiate the assigned cause of action.

Under the circumstances disclosed by these papers, and considering the substantially general denial interposed by the defendants, I am also of opinion that no examination or inspection should be permitted until the very foundation of the plaintiff's case has been laid by the examination of the assignor Eno. It will be time enough when the plaintiff has proved by his assignor the character and extent of the alleged transactions and has fully exhausted his knowledge upon the subject matter assigned, to seek to supply, in the manner now contemplated, facts which cannot otherwise be obtained. It may well be that after such examination has been completed, it will be apparent that the plaintiff needs neither an examination nor an inspection, or if he does, that it should be specially limited.

It is a mistake to suppose that the defendants owe any duty to this plaintiff. He is not their customer, but merely the assignee of a cause of action which charges them with fraud. They should not in such an action be required to furnish evidence against themselves unless the plaintiff makes out a perfectly clear case under the rules and the authorities. Such a case has not been made out. On the contrary, I feel bound to say that these applications look very much like a mere experiment to ascertain whether evidence of fraud is attainable.

Both motions should be denied, with costs, without prejudice to any further application which the plaintiff may be advised to make upon fresh papers after the testimony of Eno has been taken.

After the rendering of this decision an order was presented to the justice presiding at special term for settlement, which, after denying the motion, granted the plaintiff leave "to renew his said motions upon further papers after the examination of John C. Eno, assignor of said plaintiff," and the plaintiff's attorney sought to have added thereto the following phrase; "or upon the presentation of his affidavit stating his knowledge or want of knowledge of the matters involved in this action." The justice directed the entry of the order as proposed, without the addition of the clause proposed by plaintiff's counsel, filing the following memorandum of his reasons for so doing.

Barrett, J.—I think, upon all the facts and circumstances disclosed upon these motions, that it would not be a fair exercise of discretion to permit their renewal upon any thing else than Eno's testimony in the cause. I am clearly of the opinion that a substantial case, up to the point at least of the alleged fictitious character of the purchases

and sales, should be made out (and that even as to the latter, Eno's knowledge and information should be fully tested by cross-examination upon commission) before the plaintiff should be permitted to apply for an inspection of the books and papers or further examination.

The order must be settled as proposed by the defendant.

PEOPLE *ex rel.* REYNOLDS CARD MANUFACTURING COMPANY *v.* DISTRICT COURT IN THE CITY OF NEW YORK FOR THE FOURTH JUDICIAL DISTRICT ET AL.

§§ 2091 *et seq.* 3216.

Writ of prohibition—When will not lie—Appeal from justice's court.

A writ of prohibition restraining proceedings in an action will not lie where there is a remedy by appeal.

If a justice of a district court in the city of New York erroneously refuses to accept an undertaking given to remove a cause from his court to the New York court of common pleas and to sign an order of removal, the remedy is by appeal from his determination; and it is well established that the right to appeal in such case exists.

Where a justice erroneously refuses to accept an undertaking given to remove a cause from his court to the court of common pleas, and to sign an order for the removal, a writ of prohibition will not issue restraining further proceedings before the justice.

Instance of a case in which it was doubtful whether the proceedings of the defendant in an action in a district court in the city of New York to obtain its removal to the court of common pleas were so strictly correct as to compel the removal.

(*Decided November* 23, 1887.)

Hearing on alternative writ of prohibition.

The motion papers set forth that the relator was the

defendant in a certain action brought in the district court of the city of New York for the fourth judicial district, by Edward F. Underhill, one of the defendants herein; that the summons in said action was served upon the relator, returnable November 4, 1887; that, on that day, the plaintiff and the defendant both appeared in court; that the summons demanded judgment for $150, and that the pleadings were oral, the plaintiff's complaint being for rent due the plaintiff from the defendant which amounted to $150, and the defendant's answer a general denial; that, on November 5, 1887, the relator executed an undertaking with the Fidelity & Casualty Company of New York, a corporation duly authorized by the State of New York to act as surety in actions in the courts of this State, in the sum of $300, being double the amount of damages claimed in the summons, for the purpose of applying on the return day for an order removing said action to the court of common pleas for the city and county of New York; that, on the return day, after issue was joined, and before an adjournment was granted, the defendant applied to Alfred Steckler, justice of said court, for an order removing said action into the court of common pleas and duly filed said undertaking; that the justice then and there fixed the sum of $300 as the proper amount for which an undertaking should be given, but refused to accept said undertaking, and no order was made requiring the surety to justify, but adjourned the cause to November 5, requesting defendant to file a new undertaking on said day in the same amount; that, on November 5, the defendant filed with the clerk of the court a further undertaking in the sum of $300; the sureties upon which were the Fidelity & Casualty Company of New York, and Henry A. Dingee, of the State of New York, which undertaking was duly executed in conformity with all the provisions of the law relating to such undertakings, and the relator again presented the proposed order for the removal of the cause to the court of common pleas before an adjournment was asked or

granted on behalf of the defendant, and the justice refused to accept the bond, although the same was filed, and refused to sign said order for removal, and did not provide for a justification of the sureties, but adjourned the cause to November 12, 1887, for trial upon that day.

On these papers, an alternative writ of prohibition directed to the district court in the city of New York for the fourth judicial district, Alfred Steckler and Edward F. Underhill, was granted, requiring those to whom it was directed, and either of them, "to desist and refrain from any further proceedings in an action pending in the district court of the city of New York for the fourth judicial district, in which Edward F. Underhill was plaintiff, and the Reynolds Card Manufacturing Company was defendant, until further direction of the New York supreme court; and also to show cause at the time when, and place where this writ is made returnable why you and each of you should not be absolutely restrained from any further proceedings in said action, and you are, and each of you is hereby commanded to make the return to this writ at the special term of the New York supreme court of the city and county of New York, to be held at chambers thereof, at the New York court-house, in the city of New York, on the 21st day of November, 1887, at 10.30 o'clock in the forenoon of that day."

The return of the defendant, Edward F. Underhill, to this writ objected to its regularity on the ground that it was not granted at the special term of the court; to the sufficiency of the papers upon which it was granted, on the ground that it "does not appear that either of the defendants threatened to do any act or thing beyond their jurisdiction; . . . that it does not appear therefrom that a remedy by law does not exist for the redress of the alleged wrongs and injuries;" and that the alleged error "is subject to review by an appeal to the court of common pleas;" and also setting forth, beside the facts above stated, that the undertaking was objected to, and not accepted, be-

cause defective in form, and also because an order had not been made or sought fixing the amount of the undertaking to be given; the return of Justice Steckler to the writ made the return of the defendant, Underhill, a part thereof, and also set forth that all the acts performed by him were done "in good faith, without malice, fraud or collusion," and solely in accordance with the duty imposed upon him by law as such justice.

Lewis H. Hyde, for the relator and writ.

John Fennel, for the defendants, opposed.

Barrett, J.—It is well settled that the writ of prohibition will not lie, where there is a remedy by appeal People *v.* Nichols, 79 *N. Y.* 582; *Ex parte* Gordon, 2 *Hill*, (363; and *Ex parte* Brandlacht, 2 *Id.* 367). That such remedy exists here, if the justice erroneously refused to accept the undertaking and to sign the order of removal, is equally well settled (O'Connor *v.* Maschcowitz, 48 *How. Pr.* 451; Hogan *v.* Devlin, 2 *Daly*, 184).

If the writ was granted, the suit in the district court would be permanently stayed, for the justice would be prohibited and the court of common pleas would be without original jurisdiction, as the action only reaches that court upon the order of removal being signed. It is clear, upon the law, that the relator is not entitled to the writ; and I may say that the alternative writ was granted, if not improvidently, at least without due reflection.

Upon the facts, too, I think it very doubtful whether the relator's practice was so strictly correct as to compel the removal.

There must be a final order against the relator, with $20 costs and disbursements.

DAVIES *v.* WILLIAMS ET AL.

SUPREME COURT, FOURTH DEPARTMENT, ONONDAGA COUNTY, SPECIAL TERM, OCTOBER, 1887.

§§ 3228, 3248.

Costs—When question of title to land arises—Review of right to costs in such cases.

A certificate of a referee before whom an action is tried, in which the defendant recovers less than $50, to the effect that the title to land came in question upon the trial, is conclusive evidence of that fact before the taxing officer; but the court has power upon motion at special term to review the grounds upon which the certificate was made, and determine whether it was properly or improperly granted.

Upon a motion to set aside a judgment entered in favor of the plaintiffs in an action, and the taxation of costs in favor of the plaintiff recovered less than $50, and the referee before whom the case was tried certified that the title to land came in question upon the trial, the question whether a claim of title to real property arose upon the pleadings or in the action or came in question upon the trial, is before the court for determination.

Where the complaint in an action contained three counts, one of which was for labor and materials furnished the defendants, part in pursuance of a written agreement, but all at their request, in erecting a dwelling-house on a lot of land alleged to be jointly owned by the defendants; the second, for damages caused by the entry of the defendants into such house before it was completed, without the consent of the plaintiff; and the third, for lumber and materials belonging to the plaintiffs, taken and used by the defendants, but not in connection with the erection of said house; and the answer of one of the defendants contained a general denial,—*Held*, that a claim to the title of land arose upon the pleadings and was a necessary issue to be proved upon the trial, and not a mere collateral one.

Langdon *v.* Guy 16 *Weekly Dig.* 201, followed.

(*Decided October*, 1887.)

Motion by defendants to set aside a judgment entered

in this action in favor of the plaintiff, and the taxation and retaxation of the costs included therein; also to vacate a judgment entered in the same action in favor of the defendants and to set aside the certificate of a referee relating to the question of title, the recovery being less than $50.

The opinion shows other facts.

Isaac Tripp, for plaintiff.

John D. Griffith, for defendants.

VANN, J.—The certificate of the learned referee was conclusive proof before the taxing officer to show that the title to land came in question upon the trial (Lillis *v.* O'Conner, 8 *Hun*, 280). If, however, the certificate was improperly granted, the court has power to review, upon motion at special term, the grounds upon which the certificate was made (Barney *v.* Keith, 6 *Wend.* 555). This motion, therefore, brings up the question whether a claim of title to real property arose upon the pleadings in this action, or came in question upon the trial (*Code Civ. Pro.* §§ 3248, 3228).

By the first count of his amended complaint, the plaintiff alleges that the defendants are jointly and severally indebted to him for labor done and materials furnished at their request, in pursuance of a written agreement covering a portion of such labor and materials, in erecting a certain dwelling-house on a lot of land in the city of Utica *jointly owned by the defendants.*

The second count is for damages caused by the entry into possession by the defendants of the house in question before it was completed, and against the protest of the plaintiff.

The third count is for lumber and materials belonging to the plaintiff, taken and used by the defendants for their

own benefit, and not for any purpose connected with the erection of said dwelling.

The defendants answered separately, the defendant Susanna Williams pleading, among other defenses, a general denial. The other defendant does not deny the ownership of the lot upon which the house in question was erected, as alleged in the complaint.

This analysis of the pleadings shows that one of the issues raised by the answer of Mrs. Williams was whether the defendants jointly owned said lot. Both the ownership of the premises by the defendants and the nature of their title is alleged on the one hand and denied on the other.

The learned counsel for the defendants, however, insists that both the title and the nature thereof were collateral facts; that, hence, the averments relating thereto were immaterial, and that a denial thereof did not put in issue the title to real estate. It is true that the object of this allegation and the proof introduced to support it was to establish an implied contract on the part of Mrs. Williams to pay whatever sum was actually due to the plaintiff. The theory of the first count of the complaint is that the defendants owe the plaintiff a certain sum for building a house; that a part of the labor and materials was covered by a written agreement, but as to the remainder the law infers a promise on the part of both defendants to pay the same, from the fact that they jointly owned the lot upon which such house was erected. According to this theory of the complaint, the allegation of ownership was material, and the proof thereof necessary. There could have been no recovery without such proof, and the averment, although inartificial in form, was an appropriate basis for the evidence. Both the allegation and the proof were therefore material. The finding of this fact by the referee would estop the plaintiff from maintaining an action of ejectment against the defendants to recover the lot in question upon any theory inconsistent with the joint own-

ership of the defendants at the time alleged in the complaint. This case is not like Landgon *v.* Guy (16 *Weekly Dig.* 201), where the allegation that a personal assault was committed on plaintiff's land was denied, as the material part of the averment in that case was the assault, and not the place where it was committed, which was matter of description merely. In this case, the place where the house was built was as vital as the erection of the house itself, because, if it had been built upon lands in which Mrs. Williams had no interest, she could not have been held liable.

It follows that the certificate was properly made, and that the taxation of costs in favor of the plaintiff was regular.

No proof has been furnished showing that any item of such costs was improperly allowed, or that any particular item was objected to, or the grounds of any objection.

The judgment entered in favor of the defendant was irregular, and, as they ask to have it set aside, that part of their motion should be granted, and the clerk directed to detach from the roll therein the report of the referee, and attach it to the other judgment-roll.

As the principal question involved on this motion is new, no costs are allowed to either party.

An order may be entered accordingly.

In re DAWSON.

WILSON and ano. *v.* DAWSON et al.

Supreme Court, First Department, New York County, Special Term, November, 1887.

§§ 708, 1370, 1388.

Execution—Return to, where moneys collected under attachment.

Where moneys have come into the possession of a sheriff under an attachment and the sheriff converted them to his own use, the defendant in the attachment is entitled to have the moneys received by the sheriff, credited upon an execution subsequently issued against him, upon a judgment recovered in the action.

It seems, that where a sheriff has collected money upon an execution, notwithstanding the money has not been paid by him to the creditor therein, the debtor is entitled to a return to the effect that the judgment has been satisfied.

People *v.* Hopson (1 *Denio,* 574); Peck *v.* Tiffany (2 *N. Y.* 451); followed. McBride *v.* Farmer's Branch Bank (7 *Abb. Pr.* 347), distinguished.

Where the debtor in an execution has paid the amount thereof to the sheriff, he is entitled to a statement of the truth upon the return of the execution, and a motion to require a return in accordance with the facts is his proper remedy.

A sheriff having collected moneys under an execution is required to pay them over to the plaintiff in the execution; and if he fails to do so, the plaintiff must exhaust the law against him and his bondsmen, and if he stills fails, the plaintiff loses his claim.

(*Decided November* 28, 1887).

Motion by defendant in an execution from an order requiring E. J. Shelly, under sheriff of Alexander V. Davidson, late sheriff of the city and county of New York, or his authorized deputy, to make a return of an execution in accordance with the facts.

John W. Wilson and De Lorme Knowlton, composing

the firm of J. W. Wilson & Co., in the city of New York, began an action in this court against the defendants, Ernest L. Dawson, individually and as surviving partner of the J. M. Dawson Packing Company, of San José, California, for damages for a breach of contract in the sale of certain canned goods. On June 25, 1885, an attachment was issued on the ground of the defendants' non-residence. On September 21, 1885, a copy of said attachment was served upon the firm of McDowell, Pearse & Co., of New York city; on September 24, 1885, Joseph T. McDowell, a member of the last-named firm, made a deposition that said firm then owed to the defendants in said action $1,006.12. On the arrival of certain merchandise then *en route* to New York, the said firm would owe the defendants the further sum of $1,223.08. On October 1, 1885, an order was applied for by J. W. Wilson & Co.'s attorneys, and obtained, directing the said firm of McDowell, Pearse & Co. to pay to the sheriff of the city and county of New York as property of the defendants, levied on under the attachment herein, the sum of $1,006.12 in their possession and due to said defendants, and further directing that, within ten days from the date of the receipt by the said firm of the remainder of the goods mentioned in said deposition of the said McDowell, the said firm pay and turn over to the sheriff of the city and county of New York, as property of the defendants levied on under the attachment herein, the sum of $1,223.08 then in their possession and due to defendants. In pursuance to said order, McDowell Pearse & Co. did pay to the sheriff of New York city and county the money due from them under and by virtue of the warrant of attachment in said action issued; and the sum actually paid by the said firm to the said sheriff amounted to $2,316.48.

On or about February 8, 1886 A. V. Davidson (sheriff of the city and county of New York during the times hereinafter mentioned) disappeared, and the parties to this action have been unable to find him, though diligent search has

been made. Ever since the disappearance of said Davidson, there has been in the city and county of New York one Edward J. Shelly, a deputy sheriff under said Davidson duly authorized to transact the business of the office of sheriff remaining unfinished from the term of said Davidson.

The defendants duly appeared and answered, in the action in which said warrant of attachment was issued, and thereafter the issues therein came to trial on October 10, 1886, before the court and jury, and resulted in a judgment for plaintiff, Wilson and Knowlton and against the defendants, in the sum of $2,452.86, which was duly entered on October 19, 1886. On November 19, 1886, an execution on said judgment and for the amount thereof against the property of the said defendants was issued, which execution has been returned wholly unsatified. The return indorsed on said execution being in the following words, to wit: "No personal or real property. Alexander V. Davidson, late sheriff;" and no part of said judgment has been paid except as herein set forth.

Upon March 18, 1887, the defendants paid the plaintiffs $171.87, which was the difference between the judgment recovered against the defendants and the amount of money attached by the sheriff of New York city and county and paid to the sheriff by McDowell, Pearse & Co., together with interest from entry of judgment to the date of the payment, and the amount of poundage or fees to which the sheriff was entitled upon the sum in his hands; and at the same time the attorney for said Dawson demanded in writing from the attorney for Wilson and Knowlton a satisfaction of the judgment against said Dawson, which was refused.

Robert S. Rudd, for petitioner and motion.

Henry D. Hotchkiss, for sheriff, opposed.

Barrett, J.—This is a motion by the defendant in an execution to require the late Sheriff Davidson or his author-

ized deputy to make a return in accordance with the facts. This motion is the defendant's proper remedy. If he has paid the judgment, he is entitled to a statement of the truth upon the returned execution. A plaintiff may in certain cases be required to bring an action for a false return, but even he could by motion compel a sheriff with the money actually in his hands to make a truthful return (see 86 *N. Y.* 517; *Smith on Sheriffs*, 408, and cases cited). The purpose of the motion is to obtain a ruling as to whether the creditor or the debtor must lose moneys in the late sheriff's hands under an attachment, which moneys such late sheriff is said to have converted to his own use. If these moneys had been realized upon an execution, there would be no question under the cases that the loss would be the creditor's. "The judgment is satisfied," said Bronson, J., in People *v.* Hopson (1 *Denio*, 574), "when the execution has been so used as to change the title or in some other way deprive the debtor of his property. This includes the case of a levy and sale; and also the case of a loss or destruction of the goods after they had been taken out of the debtor's possession by virtue of the process. When the property is lost to the debtor is consequence of the legal measures which the creditor has pursued, the debt is gone, although the creditor may not have been paid. He must take his remedy against the officer, if he has been in fault; and, if there be no such remedy, the creditor must bear the loss." And in Peck *v.* Tiffany (2 *N. Y.* 456), it was said that when "a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed or otherwise disposed of so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution, and the plaintiff must in such case seek his remedy against the sheriff." These rules are equally applicable, so far as the question of remedy is concerned, to the case of moneys actually reduced to possession under an attachment, and, in contemplation of law, in the hands of the sheriff when the execution is

issued. It is true that the debt is not satisfied by the reduction of such moneys to possession under the attachment. They are, in fact, held as security for the subsequent judgment if obtained. But the rule does not depend exclusively upon the satisfaction of the debt. It is that the debtor's property has been actually lost to him in consequence of the legal measures which the creditor has pursued. In other words, his property (reduced to money) is actually taken possession of by the sheriff under the attachment, and is still in the hands of that sheriff unapplied as specially directed by the Code, and the process issued pursuant to the Code. This is a very different case, therefore, from McBride *v.* Farmer's Branch Bank (7 *Abb. Pr.* 347), where the sheriff never had the moneys in his actual possession, but merely levied the attachment upon moneys in a trust company. The trust company having failed between the levy and the judgment, the court held that the debtor was the loser. There the debtor's claim against the trust company was not lost to him by the attachment, but by the delay caused by his fruitless defense. Several other cases are cited, but in none of them had the debtor's property in the form of money been actually taken into the custody of the sheriff under the attachment. Under the latter state of facts, the sheriff having the moneys in his hands, as the law presumes, is required "to pay them over to the plaintiff" in the execution (*Code, Civ. Pro.* § 708). If he fails to do so, the plaintiff must exhaust the law against him and his bondsmen. If he stills fails, the plaintiff loses his claim. The law has given him an execution to be satisfied "out of the personal property attached." It has given him no more. The defendant is entitled to the application of the moneys taken from him by the law as invoked by plaintiff, and he cannot be required to pay the debt twice over merely because the plaintiff cannot induce or compel the officer of the law who holds his moneys to pay them over as required by the Code and the execution.

The motion should be granted, but without costs.

DORSEY, Respondent, *v.* PIKE, Appellant.

Supreme Court, Fifth Department, General Term, October, 1887.

§§ 788, 3045.

Justice's court—Appeal from judgment—Time to, how computed, in courts not of record—When Sunday excluded.

An appeal from a justice's judgment must be taken within twenty days of the entry of the judgment in the justice's docket, but the day on which the judgment is rendered is to be excluded, and also Sunday when that is the last day.

In computing the time within which an act must be done, if the last day falls on Sunday, that day must be included unless there is some statute providing that Sunday shall be excluded from the computation.

Section 788 of the Code of Civil Procedure,—providing that in computing the time within which an act in an action or special proceeding must be performed, the first day must be excluded and the last included, except where it is Sunday or public holiday, where it must be excluded,—applies to courts not of record; the reference therein to the last preceding section is for the purpose of defining the action in which said rule must be applied, and it does not limit its application to courts of record.

Gribbon *v.* Freel (93 *N. Y.* 93), followed. Marvin *v.* Marvin (75 *Id.* 240), distinguished.

(*Decided October*, 1887.)

Appeal by defendant from an order of the Monroe county court, denying a motion to dismiss an appeal taken by the plaintiff from a judgment of the municipal court in the city of Rochester in the defendant's favor for $5.30 costs.

The opinion states the facts.

William M. Bates, for defendant-appellant.

Henry J. Sullivan, for plaintiff-respondent.

Barker, J.—The motion to dismiss the appeal was made upon the sole ground that the same was not taken within twenty days after the entry of the judgment as required by section 3046 of the Code of Civil Procedure, —which provides that such appeal "must be taken within twenty days after the entry of the judgment in the justice's docket."

The judgment was rendered on November 22, 1886, and the twenty days after the entry of the judgment would expire on December 12, 1886, which day was Sunday. The notice of appeal was served on Monday following—December 13.

The question is, was such service timely? Without the aid of the provision found in section 788, it is clear that the notice of appeal was served too late, as the day on which the judgment was rendered is to be excluded from the computation (*Ex parte* Dodge, 7 *Cow.* 147; Marvin *v.* Marvin, 75 *N. Y.* 240).

In computing the time in which an act must be done required by any statute, if the last day falls on Sunday, that day cannot be excluded, and the act be done on the Monday following, unless there is some statute providing that the Sunday should be excluded from the computation. In certain instances, where the last day for doing a statutory act falls on Sunday, it is provided that in making the computation that day should be excluded (*Code Civ. Pro.* § 788).

We think this provision is applicable to this case, and that the notice of appeal was served in due time. All agree that the day on which the judgment was entered is not to be counted.

The reference made in section 788 to the preceding section 787, is for the purpose of defining the actions and pro-

ceedings in which the rule must be applied. Courts not of record are included within phrases of sections 787 and 788, and the rule of computation, we think, applies to acts to be done in actions or proceedings originating in the municipal court of Rochester. The language used in section 788, relative to the subject in question, is very general and should be liberally construed; and we see no reason for giving it an interpretation limiting its operation to actions and proceedings in a court of record.

It was expressly held in Gribbon *v.* Freel (93 *N. Y.* 93), that where the last day for the service of summons issued out of the marine court for the city of New York in an action where an attachment had been granted, as required by section 638, fell on Sunday, it was timely to serve the summons on the Monday following. In support of the rule the court cited seetion 788 and relied upon its provisions, as establishing the rule for making the computation. The reference made in section 788, to the preceding section was not made for the purpose of defining and limiting the instances in which the rule of computation should be applied, but for the purpose of making the rule applicable to actions and proceedings originating in courts not of record.

We are cited by the appellant's counsel, to the case of Marvin *v.* Marvin (75 *N. Y.* 240), as an authority in support of his position that the provisions of the section 788 do not apply to an action originating in a justice court. That case holds, among other things, that section 788 does not apply to acts where the law specifically prescribes a different rule of computation, than the one laid down in that section, and that in the case before it, a different rule had been prescribed by another section of the Code.

In that case, the provisions of the section, relating to the mode of computation when the last day within which an act should be done fell on Sunday, was brought before the court for its consideration. The order appealed from should be affirmed, with $10 costs and disbursements.

All concur.

McCOMB v. KELLOGG, AS EXECUTOR, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1887.

§ 3251, subd. 3.

Costs—When defendant not entitled to trial fee on discontinuance.

Where two days before a case was on the day calendar of the court and was called for trial, the plaintiff's attorneys offered to discontinue the action and pay costs, and the defendant's attorney refused to accept the costs or discontinue the action until after he had made a motion for an extra allowance, and thereafter the defendant's attorney moved for and obtained an extra allowance of $150,—*Held*, that the fact that the case had appeared on the calendar and that the defendant had secured an extra allowance did not entitle him to a trial fee, and that it could not be taxed.

(*Decided November* 25, 1887.)

Motion for a new taxation of costs.

Defendant in this action demurred to the complaint on ground that it did not state facts sufficient to constitute a cause of action. The case was duly noticed for trial at special term, and, two days before it was reached on the calendar, the plaintiff's attorneys,—being convinced by an examination of authorities that he could not sustain the pleading, the cause being one that did not survive against the defendant as executor,—sent a stipulation consenting to the discontinuance of the action, to the defendant's attorneys, which they declined to sign. They thereupon, on the same day, sent them a check for $30, costs, with the request that they should discontinue the action, and a statement that they would pay their disbursements if they

named the amount. The defendant's attorneys declined to consent to the discontinuance until after a motion had been made by them for an extra allowance, and thereafter an application was made and an extra allowance of $150 was granted. Pending these proceedings, the case was called at special term for trial, but was not tried. The defendant's attorney presented a bill of costs to the clerk for taxation, which included the extra allowance of $150 and $30 trial fee. These items were allowed by the clerk notwithstanding the defendant's attorneys objected, and this motion thereupon made by plaintiff.

Butler, Stillman & Hubbard, for plaintiff.

Holmes & Adams, for defendant, opposed.

Barrett, J.—The defendant would have been entitled to the trial fee under the cases (Jones *v.* Case 38 *How. Pr.* 350; Ehler *v.* Willis 63 *Id.* 342; Sutphen *v.* Lash 10 *Hun,* 122), but for the offer to pay costs on October 15, two days before the cause was on the day calendar and there called for trial. The plaintiff cannot be mulcted of the trial fee because of the circumstance that the defendant refused the full costs offered on the 15th in order to apply for an extra allowance. The attorney's letter on the latter head claimed no trial fee, and, but for the desire to ask an allowance, it is evident that the discontinuance would have been complete before October 17, when the demurrer was called up on the day calendar. The fact that this defendant secured an allowance of $150 is hardly a reason for allowing the trial fee which, but for the allowance, would have been clearly inadmissible.

Taxation reversed as to the trial fee, and motion to strike it out granted, with $10 costs.

FRIES *v.* COAR.

City Court of New York, Special Term, September, 1887.

§§ 723, 724, 781, 783, 784, 788.

Holiday—Saturday half-holiday not excluded in computing time—Effect of order extending time to plead after such time has expired.

The provision of the Code of Civil Procedure (§ 788),—that if the last day to perform an act falls upon a public holiday, it must be excluded in computing time, does not include the Saturday half-holiday; and, where the time for doing an act,—as, *e. g.*, pleading,—expires on Saturday, it should be done on that day.

Ex parte orders extending time to plead made by a judge out of court after the statutory time has run, are mere nullities, and may be safely disregarded; although the court may, on notice and after argument, relieve from a default and extend the time to plead, a judge out of court cannot, by a mere *ex parte* order, do so.

(*Decided September* 17, 1887.)

Motion by defendant to vacate a judgment taken by default.

This action was commenced on August 8, 1887, by the appearance of the defendant without service of the summons, and the time to answer was extended until September 10, 1887, which day fell upon Saturday. On that day, the defendant's attorney applied to the plaintiff's attorney for an extension of the time to plead, which was not granted; and on the following Monday, September 12, he procured an order *ex parte* extending the time to answer, which he forwith served on the plaintiff's attorney by mail. On the following day, the plaintiff's attorney caused the order extending time to answer to be returned to the

defendant's attorney without stating any reason why that was done, and entered judgment as for want of answer; thereupon the defendant's attorney made this motion.

Harris & Corwin, for defendant and motion.

Daniel E. Delavan. for plaintiff, opposed.

McAdam, Ch. J.—The Code provision (§ 788) that if the last day to perform an act falls upon a public holiday, it must be excluded in computing time, does not include the half-Saturday holiday provided for by the Laws of 1887, chap. 289. The time to plead herein expired on Saturday, September 10, and the answer should have been served on that day.

The *ex-parte* order granted on Monday, the 12th inst., extending the time to answer, was unauthorized, as the time to make such service had already expired, and the defendant's appropriate remedy was by application to the court, on notice, to be relieved from the default (see *Code Civ. Pro.* §§ 781, 783, 784. Stephens v. Moore, 4 *Sandf.* 674; Doty *v.* Brown, 3 *How. Pr.* 375; 1 *Tiffany & Smith Pr.* 453). The unauthorized *ex-parte* order was, therefore, properly disregarded (Hunt *v.* Wallis, 6 *Paige*, 371). While it is true that orders of the court must not be disregarded, it is equally true that ex-parte orders extending time made by a judge out of court, after the statutory time has run, are mere nullities and may be safely disregarded. Although the court may, on notice and after argument, relieve from the default and extend the time, a judge out of court cannot by a mere *ex-parte* order exercise a jurisdiction vested exclusively in the court while sitting as such (*vide ut supra*).

The plaintiff has been regular in his practice, and the motion to vacate the judgment must be denied; but, under the prayer for other relief, the default will be opened on payment within five days of $10 costs, and on serving the

answer at the time of such payment. The judgment and proceedings had thereon to stand as security, and case to be tried on the first Monday of October.

NICHOLS *v.* KELSEY.

CITY COURT OF NEW YORK, SPECIAL TERM, MAY, 1887.

§§ 1377, 1378.

Holiday—Service of papers on — When leave to issue execution granted.

The act making one-half of Saturday a holiday does not prevent the service of papers or the execution of writs in legal proceedings on that day or any part of it; and a notice of motion may be properly served on Saturday afternoon.

Where a judgment-creditor whose judgment has not been paid, has complied with the provisions of the Code, section 1377, 1378, he is entitled as of right to leave to issue a new execution.

(*Decided May* 31, 1887.)

Motion for leave to issue execution against the property of the defendant.

A judgment was recovered in favor of the plaintiff against the defendant on January 28, 1876, for $365.88, no part of which has been paid, and which remains wholly unsatisfied. The plaintiff, upon proof of this fact, made this motion.

Henry D. Hotchkiss, for plaintiff and motion.

Charles Kelsey, defendant in person.

McADAM, Ch., J.—The plaintiff has complied with the provisions of the Code (§§ 1377, 1378), and is entitled, as

of right, to leave to issue a new execution. The recent Half-Saturday Holiday act does not prevent the service of papers or the execution of writs in legal proceedings on that day or any part of it.

Application granted.

FITCHBURGH NATIONAL BANK, JUDGMENT CREDITOR, *v.* BUSHWICK CHEMICAL WORKS, JUDGMENT DEBTOR.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1887.

§ 3463.

Supplementary proceedings—Third party cannot be examined as to property of a corporation—Receiver not subject to examination in.

A third party cannot be examined in proceedings supplementary to execution as to the property of a judgment debtor where the judgment debtor is a corporation created by the laws of this State.

An order cannot be granted in proceedings supplementary to execution for the examination of a third party as to property in his possession as receiver belonging to the judgment debtor, nor where the affidavit states that he has property of the judgment debtor, either "as receiver, etc., or individually."

(*Decided December* 6, 1887.)

Motion to set aside an order granted in proceedings supplementary to execution for the examination of William Brookfield, a receiver, etc., in regard to property in his possession belonging to the judgment debtor.

Other facts appear in the opinion.

Alexander & Green, for judgment debtor, and motion.

Billings & Cardozo, for judgment creditor, opposed.

POTTER, J.—This is a motion upon an order to show cause, &c., to set aside an order in supplementary proceedings requiring William Brookfield, a receiver appoinued by this court on the dissolution of a partnership and the settlement of its affairs, to appear for examination.

The affidavit upon which the supplementary order was granted contains the statement that said Brookfield, as receiver, &c., of said copartnership, or individually, has personal property of the judgment debtor exceeding $10 in value, or is indebted to it in a sum exceeding $10, &c. The supplementary order contains the same statement in that respect.

It is shown upon the moving papers, by the judgment-roll in the action in which said judgment was recovered, that said defendant is a corporation created by the laws of the State of New York. I think it is entirely clear, upon these facts, that the supplementary order should be set aside. Section 2463 provides that article first, title twelve, of the Code shall not apply where the judgment debtor is a corporation created by or under the laws of this State. But if the defendant was an individual debtor, I do not think the affidavit that said Brookfield, as receiver, &c., or individually, owned or had property of the judgment debtor exceeding $10 in value, justified the issuing of the order for his examination; for, as receiver appointed by the court, he would not be subject to such examination (Smith *v.* McNamara, 15 *Hun*, 447).

An affidavit that Brookfield as receiver or indvidually owed the judgment debtor, or had his property, does not state a case authorizing the issuing of such order. The statement is in the alternative. One alternative,—viz.: that Brookfield as a receiver,—gives no authority or warrant for the order. It is necessarily to be inferred from the language of the affidavit and order that but one of the alternatives is true. If the alternative that Brookfield owes the debt or holds the property is the true one, then the affidavit was insufficient to warrant the order; for no one

can determine from the affidavit that the alternative is not the true one.

The order should be set aside, with $10 costs.

BETTS *v.* KRINDELL.

CITY COURT NEW YORK, SPECIAL TERM, DECEMBER, 1887.

§§ 525, 542.

Pleading—Amendment of—Verification.

A defendant who has demurred to a complaint may serve an answer as an amended pleading.

Frank *v.* Bush (2 *N. Y. Civ. Pro.* 250; S. C., 62 *How. Pr.* 282); Carpenter *v.* Adams (34 *Hun*, 429, appeal dismissed, 98 *N. Y.* 668); People *v.* Whitwell (63 *How. Pr.* 383); followed. Smith *v.* Laird (44 *Hun*, 530), not followed.

A verification to a pleading made by an agent, which states that "all the material allegations. . . . are within his personal knowledge" is sufficient without assigning any reason why the verification is not made by the party.

(*Decided December* 6, 1887.)

McADAM, Ch. J.—This court decided in 1882 (Frank *v.* Bush, 2 *N. Y. Civ. Pro.* 250; *S. C.* 62 *How. Pr.* 282) that a defendant who has demurred to the complaint may serve an answer as an amended pleading. This practice was followed by the superior court (FREEDMAN, J., in Moffatt *v.* Henderson, *Daily Reg.* March 2, 1883), and by the supreme court of this department at general term in 1885 (Carpenter *v.* Adams, 34 *Hun*, 429). An appeal was taken in this case to the court of appeals and argument was had on the merits. Instead of reversing the order for want of power, the appeal was dismissed (98 *N. Y.* 668).

The common pleas announce similar practice (People *v.* Whitwell, 62 *How. Pr.* 383), and in this way all the courts of record in this county became committed to the principle as a rule of practice. The recent case of Smith *v.* Laird (44 *Hun*, 530), decided by the supreme court of this department, overturns the practice thus established, and the question is whether this court is to embrace the new departure or adhere to established precedent. Until further instructed, it is deemed safer to adhere to the old rule until the new one is generally recognized by the courts or until it has been approved by the court of appeals. It follows from this, that the defendant has been regular in his practice.

The verification is correct. The agent swears that "all the material allegations of the answer are within his personal knowledge;" and this is sufficient without assigning any reason why the verification is not made by the party (*Code*, § 525, subd. 3).

The form adopted is that approved by Abbott in his new book on Forms, p. 150, form 217.

The motion as to the superseded demurrer abates, and the plaintiff must accept the amended pleading. No costs.

BANK OF NORTH AMERICA *v.* HORNSEY ET AL.

City Court of New York, Special Term, December, 1887.

§§ 500, 723.

Pleading—When non joinder of party defendant may be cured by amendment.

Non-joinder of a party defendant can only be taken advantage of in abatement; and, as the object of such a plea is to give the plaintiff a better

writ, it must correct the mistake so as to enable the plaintiff to set it right.

Where a defendant pleads non-joinder of a party defendant, as a defense, the error may be corrected without a new action, and an amendment should be allowed without prejudice to proceedings already had.

(*Decided December* 6, 1887.)

Motion by plaintiff for leave to amend complaint and that supplemental summons bringing in new party be issued.

This action is upon a promissory note made by the defendant Hornsey to the order of the defendant Stevens indorsed by the latter, and also in the firm name of John G. Allport & Co. It was begun on November 4, 1887. The complaint alleged that the defendant Allport did business under the firm name of John G. Allport & Co., and that he indorsed said note in said firm name, on November 10, 1887. Defendant Allport appeared and answered; the other defendants having made default, the plaintiff moved for judgment on said answer as frivolous. The motion was denied, but the court set the cause down for trial on November 18. On November 16, 1887, the defendant served an amended answer, setting up, as an additional defense, that Frances G. Allport was a member of the firm of John G. Allport & Co., in whose name the said note was indorsed, and that said Frances G. Allport was, therefore, a necessary party defendant. The plaintiffs thereupon moved for an order to amend the summons and complaint by adding thereto the name of Frances G. Allport as a party defendant, and describing her in said summons and complaint as a member of the firm of John G. Allport & Co., and permitting the plaintiff to issue a supplemental summons directed to her, as provided for by section 453 of the Code of Civil Procedure.

Root & Strong, for plaintiff and motion.

Morrison & Kennedy, for defendant, opposed.

McAdam, Ch. J.—If one is sued alone, where another ought by law to have been made co-defendant with him, advantage can be taken of the non-joinder only in abatement (*Gould Pl.* 256). The object of the plea is to give the plaintiff a better writ (*Stephen on Pl. by Tyler*, 377). The plea must correct the mistake, so as to enable the plaintiff to set it right (*Ib.*).

The defendant has pleaded non-joinder of another who ought to have been made co-defendant with him. The plaintff now moves to add the omitted person. The present practice allows the error to be corrected without a new action (*Code Civ. Pro.* § 723).

The amendment will be allowed on payment, within three days, of $10 costs, and without prejudice to the proceedings already had.

CANDEE et al. v. JONES et al.

City Court of New York, Special Term, November, 1887.

§ 3251.

Cost—When plaintiff entitled to two trial fees.

Where the plaintiff in an action succeeds on a trial, he is entitled to tax a trial fee for such trial, and also one for an inquest previously taken by him and opened.

(*Decided November* 29, 1887.)

Motion by defendant for a new taxation of costs.

The plaintiff, on February 11, 1886, took an inquest herein, which was subsequently opened on the payment

by the defendant of $11.10, being $10 costs of motion and $1.10 disbursements. Thereafter, the action was tried before Mr. Justice BROWNE and a jury, and a verdict rendered in favor of the plaintiff. The plaintiff presented a bill of costs to the clerk for adjustment, in which was included an item of $60 for two trial fees of an issue of fact. The defendant objected to this item on the ground that the plaintiff was only entitled to one trial fee,—namely, that for the trial before Mr. Justice BROWNE,—and, upon his objection being overruled, took exception and made this motion.

Alexander Thain (*Thain & Kearney*, attorneys), for defendants and motion.

P. Q. Eckerstein, for plaintiff, opposed.

NEHRBAS, J.—The plaintiff is entitled to two trial fees —one for the trial and the other on the inquest (Dodd *v.* Curry, 4 *How. Pr.* 123 Jones *v.* Case, 38 *Id.* 349; Hamilton *v.* Butler, 30 *Id.* 36; Pomeroy *v.* Hulin, 7 *Id.* 163).

The clerk's taxation must, therefore, be affirmed.

TRAVEST *v.* ALPORT ET AL.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1887.

§ 542.

Pleading—Amendment of joint demurrer.

Where two or more defendants interpose a joint demurrer, one of them cannot afterward serve an answer as an amended pleading. The

separate answer will not supersede the joint demurrer which is still of record, nor operate as a withdrawal or amendment thereof.

It seems, that if several defendants interpose a joint demurrer, and they all serve a joint answer, or even a separate answer by way of amendment, the demurrer, would be superseded thereby.

(*Decided December* 7, 1887.)

Motion for judgment on demurrer as frivolous.

The plaintiff's complaint sets forth that the defendants, John G. and Francis Alport, were copartners in business under the firm name of John G. Alport & Co., in the city of New York; that between May and September, 1887, he sold and delivered to the defendants certain quantities of merchandise amounting in value to $59.38, no part of which has been paid. The defendants jointly demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff, on December 6, 1887, moved for an order overruling the demurrer herein as frivolous, and for judgment with costs thereon, and for such other and further relief as may be just. It appeared, on the hearing of the motion that one of the defendants had served a separate answer as an amended pleading.

J. Travers King, for plaintiff and motion.

Morrison & Kennedy, for defendants, opposed.

McAdam, Ch. J.—The defendants interposed a joint demurrer. If they had served a joint answer, or even separate answers by way of amendment, the demurrer would have been superseded by the amendment. But the defendants did not do this. One of the joint defendants interposed an answer by way of amended pleading. This did not supersede the joint demurrer, which is still of record; and the separate answer by the one defendant was, under the circumstances, irregularly interposed, for it can-

not operate either as a withdrawal or amendment of the joint demurrer.

The demurrer being frivolous, the plaintiff is entitled to judgment.

PEOPLE *ex rel.* WALLACE, Respondent, *v.* ABBOTT et al., Trustees of School District No 6, in the Town of Gravesend, Appellants.

Court of Appeals, October, 1887.

§§ 1927, 1929, 1931.

Costs in action against school trustees—How collected—When mandamus not proper remedy.

A judgment recovered against the trustees of a school district in their official character, for the recovery of money due a school teacher for salary, binds the trustees individually and may be collected by execution out of their individual property; it is not a judgment against the school district, but may, under some circumstances, constitute a district charge to be paid by a tax on the district; and where the action is brought or defended without any resolution of a district meeting, no obligation rests on the district to indemnify the trustees for costs, charges or expenses incurred therein, until a district meeting shall have found in favor of the claim, and voted that a tax be assessed and collected for its payment, or unless, on appeal to the county judge and the refusal of a district meeting, it shall be decided that the amount in whole or in part ought justly to be a charge on the district.

Where a judgment has been recovered against the trustees of a school district for an unpaid part of salary of a teacher, and the trustees offer and are willing to pay the damages, but refuse to pay the costs included in the judgment, the remedy of the creditor is not by mandamus to compel the trustees to pay the judgment out of funds in their hands, but by execution issued against the property of the trustees individually.

People *ex rel.* Wallace *v.* Abbott (13 *N. Y. Civ. Pro.* 101) reversed.

(*Decided October* 18, 1887.)

Appeal from an order of the term of the supreme court in the second department, affirming an order granting a writ of mandamus compelling the defendants to pay the judgment recovered by the relator against them.

Reported below, 13 *N. Y. Civ. Pro.* 101.

The material facts are stated in the opinion.

T. C. Cronin, for defendants-appellants.

Tunis G. Bergen, for relator, respondent.

ANDREWS, J.—The relator has mistaken his remedy. A judgment recovered against the trustees of a school district in their official character for the recovery of money binds the trustees individually, and may be collected by execution out of their individual property (*Code Civil Pro.* §§ 1927, 1929, 1931). It was the same under the Revised Statutes (2 *R. S.* 476, § 108). It is not a judgment against the school district, but it may, under some circumstances, constitute a district charge, to be paid by a tax on the district. The subject is now regulated by the statute (*Laws* 1865, chap. 555, tit. 13, §§ 6–11, inclusive). It will appear by reference to those sections that, where the action is brought or defended by the trustees of a school district, by instruction of a district meeting, the costs and expenses incurred by the trustees, and all costs and damages adjudged against them in the action, are made a district charge which "shall be levied by tax" (§ 7).

Where the action is brought or defended without any resolution of a district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges, or expenses, until a district meeting shall have found in favor of the claim, and voted that a tax be assessed and collected for its payment, or unless, on appeal to the county judge from the refusal of the district meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged on the district (§§ 8–10).

The relator brought an action against the trustees of school district No. 6, town of Gravesend, to recover the unpaid part of a year's salary, under an alleged contract of employment for that period, made between him and the trustees. The trustees, in their answer, put in issue the alleged contract. The relator recovered judgment in the action for $748.97 damages and costs, the costs in the judgment constituting about one-half the amount. There was, so far as appears, no direction or instruction of a district meeting that the trustees should defend the action, nor has the district in any way assumed any liability for the costs embraced in the judgment, nor has any application been made by the trustees to the inhabitants of the district to have the costs and expenses audited or allowed. The relator seeks to enforce, by mandamus, the payment of the costs in the judgment out of funds of the district in the hands of, or under the control of the trustees. They have offered, and stand ready to pay the damages awarded in the judgment. It is clear that the school district cannot, under the circumstances disclosed, be compelled to pay the costs awarded against the trustees. The relator has a personal judgment therefor against the individual trustees, and the papers show that he has issued execution thereon, but whether it has been returned does not appear.

It is unnecessary to determine whether the relator is entitled to retain his judgment for costs, in view of the certificate granted by the judge after the costs had been taxed and the judgment entered. But, to enforce the payment of the costs out of the funds of the district, would subject the district to a claim for which, as the case stands, it is in no way liable. The scheme of the statute is to make the trustees of school districts individually liable upon contracts sentered into in behalf of the district. For the purpose of the remedy by action they are treated as the individual contracts of the trustees. The district, in certain cases, is bound to indemnify the trustees. But the district owes no

duty, either to the trustees or to the other party to the litigation, to pay the costs of a litigation undertaken or carried on without its direction, until they shall have been audited and allowed in the manner pointed out by the statute.

The order of the special and general terms should, therefore, be reversed and the proceeding dismissed.

All concurred.

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY *v.* DUNN.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, DECEMBER, 1887.

§§ 791, subd 10, 793.

Preferred calendar—When case not put thereon, although defendant is in custody under order of arrest.

Where a motion was made to place a cause upon the preferred calendar on the ground that issue had been joined and the defendant was imprisoned under an order of arrest, and it appeared that issue was joined on September 29, notice of trial served by plaintiffs on November 19, and that, before the service of such notice of trial, no order placing the cause upon the preferred calendar had been served, and that no proceeding to prefer the cause was taken until nine days thereafter,—*Held*, that the motion should be denied.
(*Decided, December* 8, 1887.)

Motion for an order placing this cause upon the preferred calendar of the court.

This motion was made after issue joined, on the ground that the defendant was imprisoned under an order of

arrest issued in this action. It appeared that the answer of the defendant raising an issue of fact was served on September 29, 1887; that, on November 19, the plaintiff served a notice of trial for the first Monday of December; that no order placing this action upon the preferred calendar was served before the service of the notice of trial; that, on November 28,—nine days after the notice of trial was served,—the defendant's attorney served notice of a motion to place the cause on the preferred calendar, returnable December 5, 1887. This motion arose upon said notice.

Silas M. Stilwell, for defendant and motion.

Stern & Myers, for plaintiff, opposed.

LAWRENCE, J.—Motion to prefer cause denied (see Robertson *v.* Schelhass, 62 *How. Pr.* 490; *Id.* 495; Rule 36; and *Code Civ. Pro.* § 791, subdivision 10; and § 793).

SOLOMON *v.* SAQUI ET AL.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1887.

§ 3287.

Sheriff fees—Taxation of.

The defendant in an execution is entitled to have the sheriff's fees for selling property and collecting moneys thereunder taxed, notwithstanding the plaintiff in the execution assents to the charges; the fees are payable out of the proceeds of the property sold, and the approval of the person procuring the sale will not estop the former owner of the property from questioning the accuracy of the sheriff's bill.

(*Decided December* 17, 1887.)

Motion by defendant to compel a taxation by the sheriff of his bill of fees in selling property under execu-

tion, made after demand for taxation and refusal to make the same.

The facts sufficiently appear in the opinion.

Solomon, Kantrowitz & Esberg, for defendant and motion.

Cochran & Clark, for sheriff, opposed.

McAdam, Ch. J.—Under 3 R. S. (6 ed.) 924; Code Civ. Pro., § 3287, the "sheriff, who, upon the collection of an execution, . . . claims any fees which have not been taxed, must, upon the written demand of the person liable to pay the same, cause them to be taxed."

The sheriff herein, under an execution for $579.59, sold property of the defendants and realized $379.70. The fees and expenses charged aggregate $172.62. The plaintiff's attorney has assented to the bill, and the sheriff's counsel claims that, as the defendants are not settling the execution or paying the fees, and the amount realized is insufficient to satisfy the execution, the defendants are not entitled to have the fees taxed.

This construction of the law will not do. The fees come from the proceeds of sale of the defendant's property, and the net amount realized on the execution is, in law, a payment of the judgment *pro tanto*, leaving the balance, when ascertained, to be paid by the defendants when able. The judgment creditor only credits the net amount received from the sheriff, and the defendants remain liable for the balance. It is unreasonable, therefore, to say that the defendants are not interested in the amount of the sheriff's bill.

The approval of the bill by the plaintiff's attorney may estop the judgment creditor from objecting to its accuracy, but it does not conclude the defendants, who, in reality, are the persons paying the sheriff's fees. Any other construction would impair, if not destroy, one of the evident

purposes of the statutory provision before referred to. It matters not whether a judgment-debtor pays an execution in money or it is paid by means of a sheriff's sale of his goods. In either event, it is in legal effect a payment by him, and whether the judgment is paid wholly or in part, the person making the payment is entitled, as of right, to have the fees of the sheriff taxed, to the end that the amount paid (less the legal fees) be credited upon the execution.

It follows that the defendants are entitled to have the sheriff's bill taxed. Application granted.

HOMMEYER *v.* BEERE.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, DECEMBER, 1887.

§§ 66.

Attorney's lien—When satisfaction of judgment set aside on account of.

Where an attorney prosecuted an action for personal injuries for an indigent client under an agreement that he should have one-half of the recovery and costs for his services, and in the prosecution of the action paid out about $23 for disbursements and incurred $50 for the services of counsel, and, after recovery of judgment for $200 damages and $133 costs, received $50 on account thereof, and the plaintiff accepted from the judgment-debtor a note for $75, and, without the attorney's knowledge, executed satisfaction of the judgment,—*Held*, on a motion by the attorney to set aside the judgment so that he might enforce his lien for compensation, that the motion should be granted. (*Decided December* 8, 1887.)

Motion to set aside and vacate a satisfaction of the judgment for $336.23 recovered herein by the plaintiff, either wholly or as to the extent of the plaintiff's attorney's lien thereon.

This action was brought to recover damages for personal injuries resulting from defendant's negligence. At the time of its commencement, the plaintiff being a poor person and unable to pay counsel fees, it was agreed between him and his attorney, that the latter should have and be entitled to the costs recovered in this action, if any, and for his compensation for his services in said action, beside a counsel fee, and should have a lien upon the judgment for the same. The action was prosecuted by said attorney to final judgment in favor of the plaintiff for $200 damages, $110 costs, and $26.23 disbursements; judgment was duly entered, and notice of entry thereof served upon defendant's attorney. After the expiration of a stay of thirty days obtained by defendant, his counsel requested the plaintiff's attorney to issue execution, as the defendant would not appeal, but intended to pay such judgment in satisfaction, and said attorney consented. Thereafter, before the execution was returned, the plaintiff's attorney was taken ill and did not return to his office until October 17, 1887. In the meantime; his clerks being in charge, he directed said clerk to collect from the defendant the judgment against him, and said clerk collected the sum of $50, and at the time of such collection informed the defendant of the lien of said attorney upon the judgment, and that all moneys must be paid to said attorney or his clerk and not to the plaintiff. It also appeared the plaintiff was a poor man and unable to pay counsel fee, and that, unless the attorney's lien upon said judgment was secured and protected, he would lose his entire compensation for services; that he (said attorney) employed counsel to attend at the trial of this action, for which he is bound to pay the sum of $50; that, during his sickness and absence from his office, the defendant obtained from the plaintiff the satis faction of the judgment herein without the payment of anything whatever; that at the time he secured such satisfaction, he, by simply giving the plaintiff a note to pay the sum of $75, which note is unpaid, and, which the plaint-

iff's attorney swears he believes, is worthless; that the full amount paid to the defendant for the satisfaction of a judgment for $336.23, was only the sum of $50.

C. D. Rust, for plaintiff, for the motion.

William H. Myer, for defendant. opposed,

LAWRENCE, J.—Motion granted (see Coster *v.* Greenpoint Ferry Co., 5 *N. Y. Civ. Pro.* 146; Ackerman *v.* Ackerman, 14 *Abb. Pr.* 229).

ESTATE OF LYMAN SOULE, DECEASED.

SURROGATE'S COURT, CAYUGA COUNTY, NOVEMBER, 1887.

§§ 721–730, 2517, 2538.

Surrogate's court—Amendment of citation in—When court has jurisdiction although citation defective.

The rules relating to amendments in courts of record prescribed by the Code of Civil Procedure, §§ 721–730, are applicable to proceedings in surrogate's courts. [2]

Where a petition for the revocation of the probate of a will set forth all necessary facts, and the prayer thereof conformed to the requirements of the statute, but the citation issued thereon was directed to the executors named in the will as individuals without their official title,—*Held*, that the surrogate's court thereby acquired jurisdiction over such executors and had power to amend the citation by inserting their official title; [3] that the objection being partly technical and not reaching the merits of the proceedings, the court should exercise this power. [1]

Bank of Havana *v.* Magee (20 *N. Y.* 355), [4] Risley *v.* Wightman (13 *Hun*, 163), [5] Tasker *v.* Wallace (6 *Daly*, 364), [7] Tighe *v.* Pope (16 *Hun*, 180), [8] Haddow *v.* Lundy (3 *T. & C.* 777); [9] Stilwell *v.* Carpenter (62 *N. Y.* 639), [13] followed.

Phillips *v.* Melville (10 *Hun*, 211), [6] New York State Monitor Milk-pan Company *v.* Remington Agricultural Company (25 *Hun* 475), as reversed, 89 *N. Y.* 22), [10] Van Cott *v.* Prentice (104 *N. Y.* 54), [11] Fountain *v.* Carter (2 *Dem.* 313), [12] distinguished.

It is the duty of the court to disregard any error or defect in proceedings which do not affect the substantial right of parties. [3]

The test as to whether the amendment of a process is proper under the Code appears to be, whether the character of the action or proceeding will thereby be changed, and if not, and the proper parties in interest have had due notice, any amendment may be made in the names or description of parties, which will conform to the intention as shown in the pleading; [15] and *it seems*, the rule laid down in the earlier cases was that process was not amendable where it appeared void upon its face, and that it was held void for what it contained but not for the omission of some essential requirement. [14].

(*Decided November*, 1887.)

Motion by executors to dismiss proceedings on the ground that the court has not jurisdiction of the necessary parties or subject matter.

The will of the decedent, Lyman Soule, and codicils thereto were admitted to probate by the surrogate of Cayuga county, on June 28, 1886. On March 25, 1887, a petition for the revocation of the said probate was duly filed, in which the grounds upon which it was demanded were fully specified, and which set forth the names of the executors of said will, who have all duly qualified, and of the legatees named therein, and also alleged that the petitioner was an heir at law and next of kin, as well as legatee, and, as such, interested in the estate of the decedent, and prayed for a decree revoking said probate and for such other and further relief as may be just, and "that the executors, devisees and legatees named in said will and codicils, and all persons who are parties to the proceedings in which said probate was granted, be required to show cause why said probate should not be revoked," etc. On the same day, a citation was issued on said petition by the surrogate's court of Cayuga county directed to all the

parties named therein, the name of the executors being first given, each one being repeated among the other names, but they not being anywhere in the citation designated as executors. On June 7, 1887, the return-day named in the citation, the petitioner and certain of the parties appeared; special guardians were appointed for infant parties, and the proceeding was adjourned until July 6, 1887, when the executors, who had theretofore not appeared either as executors or individually, appeared generally by counsel solely for the purpose of making this motion.

H. V. Howland, for executors and motion.

M. M. Water, and *Woodin & Warren*, for petitioner, opposed.

W. E. Hughitt and *M. A. Knapp*, for legatees.

W. R. Hopkins and *H. E. Hills*, special guardian for infant parties.

Teller, Surr.—The question presented by the motion to dismiss this proceeding is, whether this court has any jurisdiction of the necessary persons or subject matter. It is contended by the moving parties that the executors not being named as such in the citation, there has been an utter failure to comply with the statute by which the authority of this court is conferred. There is no contention that the petition does not set forth the necessary facts, or that the prayer thereof does not conform to the requirements of the statute, and had the citation followed the demands of the petition, the motion would have had no foundation. The petition was filed within the time prescribed by law. By section 2517 of the Code of Civil Procedure, it is enacted that "the presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But, in order to entitle the petitioner to the benefit of this

section, a citation, issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in section 2520," etc.

The time for the service of a citation having elapsed, this proceeding must stand, if at all, upon the service already made. No new or supplemental citation can be of any avail, and it becomes necessary to determine whether service upon the executors of a citation directed to them as individuals without their official title, confers jurisdiction upon the court to proceed as against them, and to grant an amendment of the citation to conform it to the petition. If the court has this power, I think it ought to be exercised, as the objection raised is purely techni-
[1] cal, and does not reach the merits of the proceeding.
[2] The citation was served within the time required to give the petitioner the benefit of section 2517, and upon the proper persons. The rules relating to the amendments in other courts of record (*Code Civ. Pro.*, §§ 721–730) are made applicable to the proceedings in surrogate's courts. Section 2538.

Section 723 of the Code provides, "The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect," etc. No amendment can be allowed which changes the character of the proceeding. The petition which bears the nature of a pleading in an action, and the object of which is to appraise the court and parties of the character of the proceeding, the relief sought, and the grounds therefor, has set forth the executors in their official capacity, and is in no respect different from what would be required to authorize a citation addressed to the executors as such.
[3] Any party, referring to the petition, would be informed as to the facts upon which revocation of

probate is sought and as to whom the parties thereto were intended to be. The names of all the executors appeared twice in the citation. The proper parties were served: they are presumed to know of the filing of a petition. They had access to it, and must be deemed to have seen and known its contents. It is made the duty of courts to disregard any error or defect in proceedings which shall not affect the substantial rights of parties. The omission complained of would seem to have been a clerical error on the part of the person writing out the citation. In these circumstances, is it not within the power of this court to amend the citation to make it correspond with the petition?

[4] In the case of the Bank of Havana *v.* Magee (20 *N. Y.* 355) one Charles Cook, who had been carrying on a banking business under the name of "The Bank of Havana," brought an action in that name, which ought to have been in his individual name. The court of appeals held the proceedings were all amendable under section 173 of the Code of Procedure, which was similar to section 723 of the Code of Civil Procedure. The court say it is apparent from the proceedings that the parties understood each other perfectly, and that it was the duty of the court below, when the objection was taken, to order the pleadings to be amended.

[5] In the case of Risley *v.* Wightman (13 *Hun*, 163), the defendant denied that the plaintiff was ever appointed executor. The evidence showed that the plaintiff had been appointed administrator with the will annexed. The court held that the complaint was amendable, that it did not change the rights of the parties, and constituted a mere technical variance.

[6] In the case of Phillips *v.* Melville (10 *Hun*, 211), it was sought, after taking evidence, to amend the summons and complaint by changing the action by an administratrix to one in her own favor individually. It was held that the change could not be made, for the reason

that it made a new action, distinct and separate from the manner in which it had been commenced.

[7] In Tasker *v.* Wallace (6 *Daly*, 364), an action against a stockholder upon a judgment recovered in a suit brought against "the West Side Railroad Company," under which name a judgment was recovered, upon motion afterward made, the court allowed the summons, complaint, judgment-roll and execution to be amended to make the title of the defendant "the West Side and Yonkers Railroad Company." It was held, that, as the summons had been served upon the proper officers of the company, and the amendment did not create another or different action, it was properly allowed.

[8] In the case of Tighe *v.* Pope (16 *Hun*, 180), plaintiff moved for leave to amend the summons and complaint by striking out the words, "as administratrix," and to proceed against the defendant personally. It was held by the general term of the supreme court, that the motion was proper and should have been granted, as it would have worked no change in the cause of action. The same person would be defendant and no increased burden would be imposed upon her.

[9] In Haddow *v.* Lundy (3 *T. & C.* 777), affirmed by court of appeals,* an action by a person in her own right was changed to one in her favor as administratrix.

[10] In the New York State Monitor Milk Pan Co. (Limited) *v.* Remington Agricultural Works (25 *Hun*, 475), it was held by the general term, that an amendment was permissible striking out the defendant's name and substituting therefor the names of the three partners who had purchased the defendant's business and were carrying it on under the defendant's name. This decision was reversed by the court of appeals (89 *N. Y.* 22), but upon the ground that the effect of the amendment was to change the action to one against other and different parties. The

* Reported 59 N. Y. 320.

company named represented stockholders and different interests from those represented by the parties sought to be made defendants. The court says: "While full authority is conferred for adding or striking out the name of a person or a party, or correcting a mistake in such name, it does not sanction an entire change of name of the defendant by the substitution of another or entirely different defendant."

[11] In the case of Van Cott *v.* Prentice (104 *N. Y.* 45), an action against defendants as executors, the complaint alleged that the defendants held certain property in their representative capacity, which defendants admitted. The complaint conceded that the defendants asserted no other title or claim. After trial, a motion was made to amend the summons and complaint and ordering the judgment awarded to be entered against the defendants individually, and *de bonis propriis.* It was held the amendment substituted a new and different cause of action, which as individuals the defendants had had no opportunity to defend.

[12] In the case of Fountain *v.* Carter (2 *Dem.* 313), a proceeding for the revocation of probate of a will, a petition had been filed within a year, the citation was served within sixty days upon the executor; but no service, whatever, had been made within that time upon any other person entitled to be made a party. It was held by the learned surrogate, and very properly, that the proceeding should be dismissed. The time for further service had elapsed, and the petitioner had forfeited the benefit of section 2517.

[13] In Stilwell *v.* Carpenter (62 *N. Y.* 639), defendant moved to dismiss the complaint on the ground that the proof showed the plaintiff had no interest in his representative capacity; held that, as a cause of action was established in favor of the plaintiff, personally, and the complaint showed that she brought the action both as devisee and executrix, the motion was properly denied.

[14] The rule laid down in the early cases was that process was not amendable where it appeared void upon its face. It was held void for what it contained, but not for the omission of some essential requirement. This the court would allow supplied,—as for instance, the clerk's signature, the seal of the court, or the name of the defendant,—after the writ was executed and the defendant was in custody under it (1 *Tidd Pr.* 161).

[15] The test as to whether an amendment of a process is proper under the Code appears to be whether the character of the action or proceeding will thereby be changed, and if not, and the proper parties in interest have had due notice, any amendment may be made in the names or description of parties which will conform to the intention as shown in the pleadings. I cannot see that there is any prohibition against the continuance of this proceeding. I think the court has jurisdiction of the parties and subject-matter and an amendment of the citation should be made in the interests of justice, showing the official character of the executors.

The other ground of the motion ought not to be passed upon without hearing the proofs, and this motion will, therefore, be denied.

TERRELL, Respondent, *v.* WHEELER, Impleaded, &c., Appellant.

Supreme Court, Second Department, General Term, December, 1887.

§§ 500, 1496 *et seq.*

Pleading—Ejectment—Answer denying plaintiff's alleged title need not set up evidence in support thereof—Tax sale.

In an action to recover possession of real property, a simple denial of

plaintiff's title is the proper mode of raising an issue in regard thereto, and it is neither necessary nor proper to set out in addition that the plaintiff's title was acquired by tax sale, and that such sale was void.

Where there has been a good sale for an arrear of taxes in the city of Brooklyn, the inadequacy of the sum bid is no defense in an action by the purchaser to recover possession of the premises sold, if there was the statutory advertisement and no fraud or evil practice.

(*Decided December* 13, 1887.)

Appeal from order denying motion for leave to amend answer.

This is an action of ejectment. The complaint is in the ordinary form. The answer of the defendant Wheeler is a denial of the plaintiff's alleged ownership and right of possession of the property described in the complaint. The defendant also admits that he claims title to the said premises, and that the other defendants are her tenants, and are in possession under her and so hold the same; and she further denies that she or her tenants, or any of them, wrongfully withhold possession of the premises or any part thereof from the plaintiff.

After the expiration of twenty days from the service of the answer, and after the right to amend as of course had expired, and the case had been noticed for trial, the defendant Wheeler applied to the court for leave to serve an amended answer; the proposed amended answer only differing from the original answer by the addition of the following averments:—

"Second. And the said defendant further alleges, as a separate defense in this action, that the plaintiff claims title to the premises described in the complaint by virtue of an alleged sale to her by the registrar of arrears of the city of Brooklyn for taxes alleged to be a charge upon the said premises; that said sale was made under color of the authority which purports to be given by the third section of chapter 114 of the Laws of the State

of New York, passed in 1883. Said defendant is advised and believes that the sale of the premises to the plaintiff is void, because the sale was negligently conducted by the said registrar, and without due regard to the rights of said defendant as owner of said premises hereinafter stated. The premises described were negligently, and without due regard to the said defendant's interest as owner, sold to the plaintiff for a sum less than half the fair market value of the same. The plaintiff's bid was the only bid for such premises at the said sale; that the registrar of arrears could, with due diligence, have procured at the said sale enhanced bids for the premises sold to the plaintiff; that he negligently failed to procure such enhanced bids and negligently made no attempt to do so; that the sum bid and paid by the plaintiff, as a considertion for said premises, was a grossly inadequate consideration and insufficient to entitle her to a valid conveyance thereof.

"Third. And the said defendant further alleges, as a separate defense to this action, that she is informed and believes that the plaintiff claims title to the premises described in the complaint by virtue of an alleged sale to her by the registrar of arrears of the city of Brooklyn, under color of the 114th chapter of the Laws of New York, passed in 1883; and the defendant says that at the time and place of said sale it was necessarily doubtful and uncertain whether or not the said law was constitutional and valid; that such necessary doubts actually influenced the biddings at such sale so far as to prevent persons attending said sale from bidding the fair market value of the property offered, including the defendant's property; that the plaintiff's bid was the only bid made at the sale for the defendant's property; that a greatly enhanced price would have been bid for it at said sale if the validity of said law had been clear and unquestionable; and the defendant says that the sum bid by the plaintiff, which she is informed and believes was $1,017.07,

is less than half the fair market value of the defendant's property, and wholly insufficient and inadequate to constitute a valid consideration for the sale."

The defendant's motion to amend her answer was denied, and this appeal thereafter taken.

James Stikeman, for defendant-appellant.

It is the common practice to allow amendments freely. Where there is no bad faith nor wanton delay, and the defense proposed is not an unconscionable one, the court should always permit the amendment. This proposition is so familiar that it requires no authority. . . . Schreyer *v.* Mayor of New York, 39 *N. Y. Super.* (7 *J. & S.*) 277. Either party should be allowed to shape his pleadings to suit himself, and be permitted, at any time before trial, to amend them so as to present his views of the question to be litigated, and upon equitable terms. . . . Troy and Boston R. R. Co. *v.* Tibbits, 11 *How. Pr.* 168. . . .

The right to interpose an equitable defense in an action of ejectment was settled in the case of Crary *v.* Goodman, 12 *N. Y.* 266. It has also been held that such defense should be pleaded. 2 *Bliss Code*, § 1511, note f; Raynor *v.* Timerson, 46 *Barb.* 518.

The plaintiff in ejectment cannot possibly object to such a rule. The matters proposed in the amendment are of that complexion that they come within the class of equitable defenses.

James Troy (*James & Thomas H. Troy*, attorneys), for plaintiff-respondent.

The original complaint and answer presented fully the question of title to the premises described in the complaint, and it is incumbent upon the plaintiff to establish such title on the trial, and if she fails in this respect she cannot recover. Even want of title in the defendant can-

not avail the plaintiff, as she must recover, if she recovers at all, on the strength of her own title, without regard to defects in the title of her adversary. If any of the matters set up by way of amendment are at all material, they can be shown by the defendant under the denial of title as fully as they may exist.

The amendment is, therefore, unnecessary, and the motion was properly denied.

Barnard, P. J.—The complaint avers that the plaintiff is the owner in fee simple and entitled to the possession of certain lands in Brooklyn which are occupied by the tenants of Nancy B. Wheeler. The relief demanded is for the recovery of the possession. The answer of Nancy B. Wheeler denies the plaintiff's title and sets up her own, and admits possession of the lands by herself and her tenants. The amendment proposed is to the effect that the plaintiff's title was acquired by tax sale from the city of Brooklyn, and that the tax sale was void. Such an averment is needless. A denial of the plaintiff's title is the proper method of pleading. The defendant may prove her allegations in any way which her evidence indicates. A portion of the amendment is not a proper defense. Assuming a good sale for an arrear of taxes, the register of arrears is not bound to procure forced bids, and the inadequacy of the bid is no defense if there be a statute advertisement and no fraud or evil practice.

The order should be affirmed, with $10 costs and disbursements.

Dykman & Pratt, JJ., concurred.

PEOPLE *ex rel.* CLARK, Appellant, *v.* GRANT, as Sheriff, and CLARK, Respondents.

Supreme Court, First Department, General Term, October, 1887.

§§ 2050, 2268, 2274, 2284.

Habeas corpus—Discharge from imprisonment on the ground that the prisoner has been previously imprisoned on same charge—Contempt—Service of papers in case of disobedience of order to pay alimony—Form of order—Amount of fine.

Where a husband was arrested and imprisoned under a commitment for contempt for failure to pay alimony, and afterward another commitment was issued against him for the same cause, and afterward, because the two preceding commitments were irregular and defective, a third commitment was issued, from arrest under none of which had he been discharged by the court, although he applied by habeas corpus for his discharge from arrest under the two first commitments, but said first two commitments were countermanded by the plaintiff therein,—*Held,* that he could not secure his release on habeas corpus under section 2250 of the Code of Civil Procedure,—providing that a person shall not again be imprisoned, restrained or kept in custody for the same cause after he has been discharged by final order made upon habeas corpus or certiorari; and *it seems,* he could not secure his discharge on this ground, even if he had been discharged from imprisonment under the two first commitments, if such discharge was made on the ground of the illegality of the commitments.

The failure of a commitment for contempt to recite that notice was given the one committed of the application for two of the orders under which the commitment was issued is not a fatal defect where it appears that such orders were entered to cure defects in preceding orders in the same proceeding which were made after hearing counsel for all parties, and which adjudged him in contempt and directed a commitment to issue against him in case he failed to pay certain sums of money he was thereby required to pay.

Where, in an action for divorce, an order has been made requiring a husband to pay alimony theretofore ordered, and directing that, if he failed to pay the same, a commitment issue against him as for con-

tempt, it is not necessary that there be served with final orders adjudging him in contempt and directing that an attachment issue, the affidavits or proofs recited therein, or that notice of the application for such order be given. Section 2274 of the Code of Civil Procedure, requiring that an affidavit and proof upon which an order to punish for contempt is granted shall be served therewith,—refers to the affidavits upon which a warrant of attachment is granted to bring a party before the court to answer for an alleged contempt, and such service of the papers and of notice of the application may be dispensed with where the contempt consists of a neglect or refusal to pay a specified sum of money as required by an order of the court.

Where an order of commitment for contempt in failing to pay alimony and counsel fee in an action for divorce prescribes the amount to be paid by the relator to relieve himself from imprisonment, the fact that it mentions no formal fine will not entitle the defendant therein to his discharge upon habeas corpus; although, *it seems*, such informality might be serviceable to him upon appeals from the orders themselves.

A husband in an action for divorce cannot be committed for contempt in not paying referee's fees which he has been directed to pay; but where an order committing him for contempt is made not only on the ground of the non-payment of such fees, but also for failure to pay alimony and counsel fee as directed by orders made in the action, he cannot be discharged from imprisonment on the ground that the commitment for the referee's fees is unauthorized, until he has paid the amount he has been legally directed to pay and adjudged in contempt for non-payment of, viz., alimony and counsel fee.

(*Decided October* 27, 1887.)

Appeal by relator from an order dismissing a writ of habeas corpus and denying his application for his discharge from imprisonment in Ludlow street jail.

On December 23, 1886, the New York court of common pleas, in an action for divorce against the relator, made an order adjudging him guilty of contempt for non-payment of certain alimony, counsel fees and referee's fees in that action, amounting to $645. On this order, a commitment was issued on which the sheriff arrested the relator on April 8, 1887. The relator at once applied for a writ of habeas corpus to test the sufficiency of such commitment, but the same was held sufficient and the writ of

habeas corpus dismissed. Thereafter, the plaintiff in said commitment voluntarily directed the sheriff to release the relator from further custody under said commitment, and the commitment was indorsed "countermanded and withdrawn." At the time of such withdrawal the relator had been imprisoned eighteen days thereunder. Previous to withdrawing and countermanding said commitment the plaintiff in the divorce suit had procured from the court of common pleas, *ex parte* and without notice to the relator, an order and an amendatory order under which she had issued to the sheriff a new commitment, and under this new commitment the sheriff arrested the relator immediately upon the withdrawal of the previous commitment. The same alimony, counsel fees and referee's fees were embraced in the second commitment, which had been embraced in the first commitment, the only difference being that the second commitment embraced the $192 additional alimony not included in the first. Under this second commitment, the relator was detained in custody until May 18—a period of twenty-two days, when the plaintiff therein again directed the sheriff to release and discharge him therefrom. Meanwhile the relator had tested this second commitment also by a writ of habeas corpus, but had failed and been remanded.

Previous to such second voluntary discharge of the relator, the plaintiff in the divorce suit had again obtained from the New York court of common pleas, *ex parte* and without notice, another order, dated May 12, 1887, and had issued to the sheriff pursuant thereto a third commitment against the relator, so that immediately upon his aforesaid second discharge the sheriff again arrested him.

The third commitment is the one under which the relator is now held and which he seeks to test by the present writ of habeas corpus. It embraces the identical sums of alimony, counsel fees and referee's fees which were specified in the first commitment; likewise those specified in the second commitment, except that it omits the addi-

tional items, amounting to $192, which were embraced in the latter commitment.

No copy of any of the "affidavits" recited in any of the *ex parte* orders in which these last two commitments were issued was ever served therewith.

The matter came before the court at special term on a demurrer by the respondent, Lizzie H. Clark (plaintiff in the action for divorce) to the relator's answer or traverse to the return made by the sheriff, which said Lizzie H. Clark adopted. The writ was dismissed and the relator remanded to the sheriff's custody, after hearing, by the justice presiding at special term, without opinion, and this appeal taken by the relator.

Edward P. Wilder, for relator, appellant.

The present commitment, under which the relator is detained, is absolutely unsupported by any final order or judgment of a court of competent jurisdiction. . . . .

The commitment was dated May 12, 1887, and is subscribed "By special order of the court, Nathaniel Jarvis, Jr., Clerk." That special order is asserted in the traverse to be an order which is dated the same day, but on its face does not even pretend to adjudge the relator guilty of any contempt, and is, therefore, no justification whatever for the commitment which it orders to be issued. If the present commitment is issued on this order alone (as the traverse asserts) the relator is instantly entitled to his discharge on the ground that the order is void upon its face. *Code Civ. Pro.* § 2033. Nor will it do to attempt to sustain this commitment by the references there contained to previous orders. The Code expressly provides that a commitment can only be issued pursuant to "a final order," not several orders. *Code Civ. Pro.* § 2281; Albany City Bank *v.* Schermerhorn, 9 *Paige*, 372. An aggregation or jumble of orders which the sheriff and prisoner must string together as best they may will not suffice. People *v.* Rogers, 2 *Paige*, 103.

If, however, we recur to the previous orders, the commitment finds no better support. The next previous order is the one of April 4, 1887, and is a mere amendment of an order dated April 12, 1887, and the two may perhaps be taken together as constituting one order, though this is doubtful. Now this order is open to the following criticisms: (1) That the commitment under which the prisoner is now held, although it recites that order along with numerous other orders to which it refers, does not purport to have been issued upon it or them, or under its authority; (2) Even if the commitment did purport to be issued pursuant to the authority of that order, the order does not furnish authority for its issuance or the issuance of any commitment whatever, but is void upon its face, because it does not direct that the relator be punished by "fine" or imprisonment, or both. In fact, no fine whatever is imposed upon the relator. Nevertheless, the order contained the naked direction that the sheriff arrest the relator and him safely and closely keep in custody until he shall have fully paid certain sums of money therein designated, amounting to $837. This is in direct violation of the Code of Civ. Pro. §§ 2281, 2284, as well as of those constitutional provisions which prohibit the imprisonment of a person for debt. See People *ex rel.* Fries *v.* Riley, 25 *Hun*, 587. . . . The courts may, by pursuing the statutes relating to contempts strictly, impose under proper circumstances, a "fine" for contempt, but this must be done in the form of a "fine," and not otherwise. *Code Civ. Pro.* § 2284. And such fine must be "sufficient to indemnify" the aggrieved party, and no more must be "imposed" upon the offender, etc., must be "collected and paid over to the aggrieved party," and the payment and acceptance of such a fine constitutes a bar to such an action by the aggrieved party to recover damages for the loss or injury. *Code Civ. Pro.* § 2284. The offender shall be imprisoned until he has paid the "fine," and "the order and warrant of commitment must specify the amount

of the "fine." § 2285. Now, neither this order nor the warrant of commitment contains one word about any "fine." Both speak only of sums of money by way of "alimony, counsel fees," etc., which the relator has failed to pay, and order his imprisonment until he shall pay them. Such an order and such a warrant are without authority of law. The order of December 23, 1886, is not one whit better. It imposes no fine, and does not even adjudge that any party is "defeated, impaired, impeded or prejudiced" in any right or remedy, and therefore can furnish no support for the present commitment. *In re* Swenarton *v.* Shupe, 9 *N. Y. Civ. Pro.* 402. The court, having before it the whole record upon which the present commitment stands, can see that it affords no authority for the commitment, and, this fact being manifest, it was the duty of the court to discharge the prisoner under the writ of habeas corpus. So held *in re* Swenarton *v.* Shupe, *supra.*

That case came up on a writ of habeas corpus. The order upon which the commitment was issued was produced upon the hearing on the return to the writ of habeas corpus. Held, that the order was lawfully before the court, open to inspection as to its sufficiency, and that it was fatally defective in that it failed to adjudge that the misconduct complained of was actually calculated to or did "defeat, impair, impede or prejudice" the rights or remedies of the petitioner, or that the latter had sustained any loss or damage thereby. . . . The statute relating to contempts carefully prescribes what are the legal requirements of such an order. It must be adjudged thereby: (1) That the thing which the defendant has been ordered to do or to pay is within his power to do or to pay; (2) That he has refused or neglected to do or to pay it; (3) That the opposite party has been actually "defeated, impaired, impeded or prejudiced" in some right or remedy by such refusal or neglect; (4) That such refusal or neglect was willful or intentional and contuma-

cious (Cockran *v.* Ingersoll, 13 *Hun*, 368); (5) In divorce cases, that sequestration of the property would be unavailing; (6) In all cases, that the amount cannot be collected by execution, but must be collected, if at all, by contempt proceedings (People *ex rel.* Fries *v.* Riley, 25 *Hun*, 537); and (7) That it be collected in the form of a "fine imposed," and that fine must be the amount as specified by Code Civ. Pro. §§ 2284, 2285, above quoted.

But, apart from these considerations, and even if we were to assume that the orders are complete, regular and sufficient, it is still conceded by this demurrer that the relator is now suffering imprisonment for the third time for the same offense, and this is contrary to the law and Constitution. . . . It has been adjudged, over and over again, that punishment for contempt as a civil remedy is a means of affording redress to the injured party, and not merely a means of vindicating the offended majesty of the law or the dignity of the court. Criminal contempts are otherwise. A fine of $250 imposed upon a culprit for flagrant disorder or such a contempt of court as offends the majesty of the court alone, it may be conceded, cannot be remitted by anybody but the court itself; but a fine which is imposed as a remedy for an aggrieved party, and which the law provides shall be paid over to such party (*Code Civ. Pro.* § 2284), becomes the property of the aggrieved party, and he can deal with it as he chooses. If he remits or releases from imprisonment the offender, whom he is entitled to hold in custody until he shall have paid it, he forfeits the right to imprison him again, precisely as he would if it were an execution against his person for the same amount of money. De jonge *v.* Brenneman, 23 *Hun*, 332; Simmons *v.* Simmons, 4 *Weekly Dig.* 130; S. C., 6 *Id.* 263; People *v.* Jacobs, 66 *N. Y.* 8. These cases show that punishment by contempt is a civil remedy, and that the fine imposed should be regulated by the amount of actual loss or damage sustained by the aggrieved party. They therefore logically reduce com-

mitments for contempt to the same status as executions against the person. Now, it is familiar that if a creditor in an execution against the person voluntarily releases his debtor after being taken in execution, he not only forfeits the right of taking him in execution again, but he releases his judgment or claim, and the law deems it absolutely satisfied. See *Herman on Executions*, § 337, and cases there cited. . . . It appears that this is the third imprisonment of the relator for the same offense. This latter fact alone should entitle him to his discharge under the doctrine of the case of the People *ex rel.* Tweed *v.* Liscomb, 60 *N. Y.* 559. . . .

If a court having jurisdiction of the accused and of the offense of which he is charged may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except on a writ of error, it is but a judicial suspension of the writ of habeas corpus. That writ is alike a protection against encroachments upon the liberty of the citizen by the authorized acts of courts and judges as against any mere arbitrary arrests (*Id.* at p. 592). In People *ex rel.* Fries *v.* Riley (25 *Hun*, 587), which was a commitment for contempt punishable civilly, the relator was discharged on habeas corpus, because it appeared that the money for the non-payment of which he was imprisoned was enforceable by execution (*Code Civ. Pro.* § 1241), and yet the commitment was regular upon its face, and was issued by a court having jurisdiction both of the parties and the subject matter. The court, citing People *ex rel.* Tweed *v.* Liscomb (*supra*), said: "There exists no undefined power authorizing the commitment of citizens for contempt in cases defined by statute" (p. 287; citing also Lansing *v.* Lansing, 4 *Lans.* 377; Housack *v.* Rogers, 11 *Paige*, 603; Matter of Watson *v.* Nelson, 69 *N. Y.* 537; Ogara *v.* Kearney, 77 *N. Y.* 423). So *In re* Swenarton *v.* Shupe (9 *N. Y. Civ. Pro.* 402), which was also a commitment for contempt, the prisoner was discharged on habeas corpus because it appeared that the

order on which the commitment stood omitted the recital that the prisoner's misconduct had "defeated, impaired, impeded or prejudiced his opponent's rights or remedies." A more extreme case for the application for the writ of habeas corpus can hardly be conceived.

The fact that the successive commitments were withdrawn or "superseded," by leave of the court of common pleas, does not aid the respondent. The respondent's "speaking demurrer" naively asserts that this was done "in order that the process of said court should be continuous," so as to "keep the said relator held for said contempt." This is precisely why it is illegal. . . . Moreover, it appears that each of the former commitments was upheld and the relator's applications for discharge were denied. Their withdrawal and supersedure, therefore, cannot be justified on the ground that they needed amendment. If the commitments had been set aside for irregularity a different rule might apply (*Herman on Executions*, § 374; *Code Civ. Pro.* § 2050, subd. 3). So, if the relator had been discharged from the former commitments for defects in them (*Id.*). . . . This practice, if tolerated, is nothing but a perpetual imprisonment; and such she frankly avows is her object (People *v.* Kelly, 1 *Abb. Pr. N. S.* 432).

Each of the *ex parte* commitments was served without the affidavit on which it was obtained, and which the Code prescribes must be served with the writ (*Code Civ. Pro.* § 2274).

Abram Wakeman (*Wakeman & Latting*, attorneys), for respondent Lizzie H. Clark.

The order of the court of common pleas is sufficient to sustain the commitment (*Code Civ. Pro.* §§ 1773, 2221, 2269, 2285, etc.). This court, upon a writ of habeas corpus, is bound by this final order of the court of common pleas. If the relator wishes to impeach its propriety or sufficiency, he must move in the court making

it (*Code Civ. Pro.* §§ 2032, subd. 2, 2034, 2043; Davison's Case, 13 *Abb. Pr.* 129; People *v.* Sheriff of N. Y., 7 *Id.* 96). If the court has jurisdiction, and the commitment is in due form, the proceedings cannot be reviewed on habeas corpus.

The claim that the relator has been arrested twice upon a previous commitment for the same offense is frivolous. The Code expressly provides that such objections shall not avail (§ 2050, subd. 3). The court has also provided that such objections should not avail, by providing in its orders for the superseding of the preceding commitment. Thus the two orders were practically but one order answered by re-issues while the relator was in the custody of the court, and the commitments were continuous.

Cockran & Clark, for Grant, sheriff, etc., respondent.

Daniels, J.—The relator is in the custody of the sheriff, under a commitment for contempt in failing to pay $150 referee's fees, $50, the balance of counsel fee, $50 on account of alimony unpaid on April 14, 1886, and the further sum of $395 awarded for the same object. A commitment for default in the payment of the same sums was issued against him out of the court of common pleas of the city and county of New York, in which the action was pending, on December 23, 1886, under which he was detained in custody for the period of eighteen days. On that day a still more formal and extended commitment was issued against him, under which he was in the custody of the same officer for a period of twenty-two days, and since the expiration of that time he has been held in like custody under the commitment annexed to the petition for the writ of *habeas corpus*, and returned with the writ.

One ground of his application for a discharge is, that he could not lawfully be detained in custody by the issuing of successive commitments in this manner, but what is

called the demurrer to the return states the fact to be, and it is probably truthful in that respect, that he was at no time discharged from custody under either of the two preceding commitments. In fact, he obtained writs of *habeas corpus*, upon which applications were made for his discharge, which, in each instance, were denied. The first and second commitments issued against him were each defective, and for that reason they were succeeded by these subsequent commitments, whose object was beyond question to legalize his custody and detention. And in this state of facts no case has been made in his favor for his discharge from imprisonment, under section 2050 of the Code of Civil Procedure, declaring a person shall not be again imprisoned, restrained or kept in custody, for the same cause, after he has been discharged by a final order made upon a writ of *habeas corpus* or certiorari. He has neither been discharged in fact nor by virtue of either of these writs, but in each case the application for his discharge under the first and second commitment has been denied.

A further reason would prevent his present discharge, if he had been formally relieved from custody under the first and second commitments. For, by subdivision three of the same section, a person discharged for any illegality in the final order, judgment or other mandate, is not entitled afterward to be discharged, when he has been again imprisoned by virtue of a lawful judgment, or other mandate, for the same cause of action. The grounds are, therefore, both ample and conclusive for overruling this objection made on behalf of the relator.

A further objection against the relator's imprisonment has been made upon the omission of the third commitment to recite that notice was given to him of the application for the order of April 12, 1887, or the order of the 14th of the same month. But those orders were entered to supply defects in preceding orders in the same proceeding, by which the relator was adjudged to be in contempt, for

the non-payment of these several sums of money. These preceding orders are mentioned in the last commitment, and before they were made, notice was given to the relator of the application for these orders. That appears to be the case with the order of April 14, 1886, and the order of December 23, 1886, in each of which a recital is made that the application for the order was opposed by relator's counsel, and that it was after hearing such counsel that these orders were made. They each required the payment of these sums of money by him and directed a commitment to be issued against him in case he failed to make such payment.

The adjudications upon which he has been committed, therefore, were regularly made after the actual hearing of the relator by his counsel, and the subsequent orders of April 12 and 14, 1887, were added for the purpose of reciting and stating more completely than these preceding orders did, the adjudications made against the relator. They were entered to formally comply with the requirements of the Code for the punishment of the relator for his disobedience of the preceding orders, and to state in detail the adjudications made setting forth such compliance. And in this manner, whatever defects may have existed in consequence of the imperfect recitals or statements of the preceding orders, have been corrected, and the relator's imprisonment and detention legalized, if it was not previously so, by means of such correction.

A further objection has been taken to these final orders, that the affidavit or proof recited in them was not served upon the defendant, and section 2274 has been referred to as supporting this objection. But it does not, for that refers to the affidavits upon which a warrant of attachment may be issued to bring the defendant before the court to answer for his alleged contempt. This was not a proceeding of that description, but all that the affidavit or proof was relied upon to establish, was, that

the relator had failed to comply with the order directing the payment of these several sums of money; and neither the service of such affidavit, or proof of notice of the application was required to be made or given to the relator. But the court was at liberty to dispense with it under the authority of section 2268 of the Code.

By section 1773 of the Code the relator was subject to punishment for his default in not making payment of the sums of money allowed for alimony and counsel fees during the pendency of the litigation. And the mode in which he was subject to punishment was that prescribed by title 3 of chapter 17 of the same act, and he was proceeded against, as that title has provided that such proceedings shall be commenced and carried on, and the orders, as they have finally been entered, contain the precise adjudication required to be made by section 2281 of the Code. By section 2284, which is a part of the same title, a fine was to be imposed upon him sufficient to indemnify the aggrieved party for the damages, loss or injury sustained by reason of his default in payment, and, because no formal fine has been mentioned in the orders, it has been further insisted, on behalf of the relator, that he is entitled to his discharge. But while the orders may be defective in this respect, they are not substantially so, for they do prescribe the amounts to be paid by the relator to relieve himself from imprisonment. This informality might be serviceable to him in support of an appeal from the orders themselves, but it cannot be by way of sustaining his application for his discharge in this collateral proceeding, so long as the orders indicate precisely the moneys he is to pay and in that manner substantially present the elements of the fine required to be imposed upon him.

The substance is in the orders creating a compliance with this section of the act, though not formally expressed, as that requires it should be done.

As to the $150 referee's fees the relator is not subject

to imprisonment for their non-payment. What the law has provided for is his punishment in this manner, for his default, refusal or neglect to pay the alimony and counsel fees allowed and directed to be paid by these orders. No provision of the Code sanctions the insertion of the referee's fees in the order as a foundation for the relator's imprisonment. But he is not entitled to be discharged from imprisonment, because this particular direction has not been authorized. Before he can secure his discharge on that ground, he must pay the other sums which he has been legally directed to pay, and adjudged in contempt for not paying (People *v.* Jacobs, 5 *Hun*, 428; affirmed, 66 *N. Y.* 8). Upon neither of the grounds presented by the counsel for the relator is he entitled to be discharged from imprisonment under the writ of *habeas corpus.* The order denying his discharge was lawfully made, therefore, and it should be affirmed with $10 costs, and also the disbursements.

Brady, J., and Van Brunt, P. J., concurred.

GARRABRANT *v.* SULLIVAN and another.

Superior Court of the City of New York, Special Term, December, 1887.

§§ 3228, 3229.

Costs—When plaintiff entitled to, although recovery is less than $50.

Where in an action to recover damages for personal injuries received by falling through a coal-hole in the sidewalk, the plaintiff recovered a verdict for $35,—*Held,* that the plaintiff could recover costs to the amount of the damages found in his favor by the jury, and no more; and that the defendant was not entitled to costs.

(*Decided December* 23 and 28, 1887.)

Motion by defendant to set aside taxation of costs in

favor of plaintiff, and also subsequent motion by defendant to require the clerk to tax costs in his favor.

This action was brought to recover damages for personal injuries received by plaintiff on May 24, 1886, by falling through an opening in the sidewalk leading to a coal-hole or vault, upon the premises occupied and either owned or leased by the defendants. The case was tried before the Hon. P. Henry Dugro and a jury, on December 8, 1887, and a verdict rendered in favor of the plaintiff for the sum of $35; on the same day, plaintiff served upon defendant's attorney a bill of costs amounting to $107.38, with notice that the same would be presented to the clerk for adjustment, on December 10, at 9 A. M. Defendant's attorney changed the hour named for the taxation therein, from 9 to 10½ A. M., and admitted service thereon, and the plaintiff forthwith restored the notice of adjustment on the original bill of costs to the condition it was in at the time the copy was served upon defendants' attorney. and on the following day mailed him a letter, which, omitting address and subscription, read as follows: "I have restored the original of the notice of adjustment to the condition it was in when served, by replacing the '9'—the hour of return—which you took the liberty of striking out without my consent, and erasing the '10½' inserted by you; I have also stricken out your admission of service." On December 10, at 9 A. M., the bill of costs, with proof by affidavit of service, was represented to the clerk for taxation, and adjusted by the clerk of the court by default, at 9¼ A. M., at the sum of $107.38. Thereafter, on the same day, the defendants' attorney procured an order to show cause why the adjustment of costs in favor of the plaintiff "should not be vacated and set aside as being wholly unauthorized and illegal, and why the defendant should not have such other and further relief as to this court may seem proper, beside the costs of this motion." This motion was heard on December 12, and the plaint-

iff's attorney presented, in opposition thereto, his own affidavit, setting forth the facts above recited, and also containing the following averments: "That deponent asserts and claims that he is entitled to his costs herein in favor of the plaintiff, to an amount equal to the verdict rendered in said plaintiff's favor, by the jury,—to wit, $35; —for the reason that this action is, as he verily believes, technically an action for a battery; that the taxation of a greater amount than $35 was procured by deponent's clerk in deponent's absence, because said clerk did not know of the position that deponent intended to take in this matter in this regard, deponent not having given him any instructions as to the amount of costs that were to be claimed; that deponent neglected to give such instructions because he expected to be at his office in time to attend to the adjustment of said costs in person, but was prevented from doing so by the pressure of other business, which detained him in the city of Brooklyn; that deponent does not claim any more than $35 costs herein, and is willing that the costs as taxed herein should be adjusted at that sum."

Max Altmayer, for defendants and motion.

Hy. Huffman Browne, for plaintiff, opposed.

Cited Thornton's Cyclopedia of Law, 72; 1 Bouvier Law Dic. 162; 1 Burrill Law Dic. 194, title "Battery."

Truax, J.—The plaintiff can recover no more costs than he has received damages. The judgment must be modified. No costs of this motion.

On December 23, 1887, after the argument of the motion and before this decision, the defendant's attorney served a bill of costs amounting to $126.56, with notice that the same would be presented for adjustment to the clerk of this court, on December 28, at 11 A. M. The plaintiff's attorney appeared at that time in opposition to

the same, and filed an affidavit that he objected thereto on the ground that the defendant was not entitled to tax costs, because the action was technically for a battery, and also specifying objections to certain items of the bill of costs, in case it was held that the defendant was entitled to costs. He also presented a copy of the order entered on the denial of the motion to set aside the taxation of costs in favor of the plaintiff, on the decision above reported, and claimed that such determination was *res adjudicata.* The clerk refused to tax costs in favor of the defendants, and the attorneys thereupon forthwith appeared before Mr. Justice Truax, and submitted the question to him, and the defendant's attorney applied for an order requiring the clerk to tax costs in his favor.

Max Altmayer, for defendant, and motion.

Contended that although plaintiff might be entitled to $35 costs under subdivision 3 of section 3228 of the Code of Civil Procedure, the defendants are also entitled to costs

Hy. Huffman Browne, for plaintiff, opposed.

Truax, J.—[Orally]—I have already decided this point; and an order having been entered, I hold, under another subdivision of that section that the plaintiffs are entitled to costs, and that the injury sustained comes within that section. I therefore sustain the clerk in his refusal to tax defendant's costs.

REYNOLDS v. PALEN AND ANOTHER.

SUPREME COURT, FIFTH DEPARTMENT, MONROE COUNTY, SPECIAL TERM, AUGUST, 1887.

§§ 783, 788.

Half Saturday holiday—When excluded in computing time—Papers on motion to open default in answering.

Where the time within which a party may serve a pleading falls on a Saturday, that day, since the enactment of the statute making half of Saturday a holiday, must be excluded in computing the time within which such service may be made; and service of the pleading on the following Monday is sufficient.*

A motion to open default in answering as a matter of favor should be denied where a copy of the proposed answer is not served with the papers, but leave to renew should be given.

(*Decided August*, 1887.)

Motion by defendants to set aside judgment entered by default on the ground of irregularity, "in that the time to serve the complaint expired without the same having been served, or an order or stipulation made extending the time to serve the complaint;" and, if said motion be denied, then for an order opening the default on terms.

The action was commenced by personal service of the summons on April 27, 1887. Notice of retainer and demand for copy of the complaint was served by mail on May 2, 1887, and received by plaintiff's attorney on the following day.

* See to the contrary, Fries v. Coar, 13 *N. Y. Civ. Pro.* 152; and also, as bearing indirectly upon the question, Nichols v. Kelsey, 13 *Id.* 154.

On June 13, 1887, plaintiff's attorney procured an order extending the time to serve the complaint ten days, and mailed the same to defendants' attorneys, which order was immediately returned, with a notice indorsed thereon refusing to accept the same, for the reason that the time in which to serve the complaint had expired when said order was obtained.

On June 29, 1887, the complaint was served on defendants' attorney by mail, and on August 5, 1887 (more than forty days thereafter), said complaint not having been returned, and no answer or order extending the time to answer having been received, the plaintiff's attorney entered judgment by default for want of an answer; whereupon this motion was made.

Calkins & Forsyth, for defendants and motion.

H. B. Hallock, for plaintiff, opposed.

Rumsey, J.—The fortieth day after service by mail of the notice of retainer was Saturday, June 11, 1887. That day, from 12 a.m. to 12 m. was a secular day, after that time, it was a half holiday. The plaintiff had, however, the whole of the Saturday to serve his complaint. The last part of it being a holiday, he was not required to act during that part of it.

Did this fact entitle him to exclude it in his computation? I am inclined to think it did, within the rule laid down in Phelan *v.* Douglass (11 *How. Pr.* 193). This being so, service of the order extending the time on the 13th was sufficient, and the plaintiff was not irregular in his practice.

The motion, so far as it is based upon an irregularity, should be denied.

The papers are not sufficient to open the default as a matter of favor, because a copy of the proposed answer is not served with the motion papers (Powers *v.* Trenor, 3

Hun, 3; Weston *v.* McCormick, 3 *Month. L. Bull.* 11). It must be denied for that reason, but with leave to renew (Gulliver *v.* Newark F. I. Co.,) 3 *Month. L. Bull.* 52).

Motion to set aside judgment denied, with $10 costs, without prejudice to a motion by defendants to open default and allow them to defend on proper papers.

DEEGAN *v.* KARP, ET AL., APPELLANTS.

GRANT, SHERIFF, ETC., RESPONDENTS.

CITY COURT OF NEW YORK, GENERAL TERM, DECEMBER, 1887.

§§ 3287, 3307.

Sheriff's fees—Taxation of—When keeper's fees allowed.

On appeal from a taxation of sheriff's fees, the party taking the appeal is concluded as to items to which he did not object on the taxation.

Where, upon the taxation of sheriff's fees, it appeared that an execution was issued and a levy on October 4, and a motion to stay proceedings thereunder granted pending a motion to set aside the execution on October 5; that, from the time of the time of the making of the levy until October 14, the sheriff necessarily kept a watchman in charge of the property levied, upon; and also that during such time the deputy sheriff was compelled to and did visit the place where the property was almost every day to see that it was not disturbed,—*Held*, that the sheriff was entitled to such compensation for his services and expenses as the court or a judge thereof allowed; that the circumstances of the case were such as to warrant the court in awarding $15 for the services of the deputy and $45 for the keeper's fees.

Crofut *v.* Brandt (58 *N. Y.* 106), Flack *v.* State of New York (95 *Id.* 461), distinguished.

(*Decided December* 21, 1887.)

Appeal from an order made at special term, taxing the sheriff's bill herein.

The facts are stated in the opinion.

Salomon, Kantrowitz & Esberg, for defendants and appellants.

Cockran & Clark, attorneys for the sheriff, respondent.

HYATT, J.—It appears from the case on appeal that on October 4, 1887, an execution in the above action was issued to the sheriff for $2,109.67.

Under this execution, a levy was made upon the fixtures and paraphernalia of the Oriental Theater, and a watchman was placed in charge from the time of the levy until October 14, 1887. On October 5, a stay was granted pending a motion to set aside the execution.

The sheriff also levied upon the receipts of the box office of said theater, amounting to the sum of $133.00.

A watchman was kept in charge of said property during the day and also during the night, to prevent the removal of the same. Each watchman was paid at the rate of $3 per day or night while in charge.

During the time the execution was stayed the deputy sheriff who made the levy swears that he was compelled to and did visit the said theater almost every day, to see that the said property which he had levied upon, and which was valuable, was not disturbed.

The execution was subsequently set aside upon the payment of the sheriff's fees, and a bill of charges for $111.22 was presented by the sheriff. Upon argument and affidavit the bill was taxed at the sum of $62.72.

The appellant still contends that the levy and return fee should be reduced from $2.72 to 62 cts. (*Code of Civ. Pro.* § 3307, subd. 6, 1). This item was not objected to; the defendants' attorney, Esberg, in opposing said taxation, presented his own affidavit in these words: "Deponent objects to each and every item in the sheriff's bill, except the levy and the return fee of $2.72." He is, therefore, concluded upon that point. The defendants' second contention is that the sheriff's bill as taxed should be further modified by disallowing the item "deputy's compensation $15" and "keeper's fees $45," or "by disallowing one or the other of the latter fees," or "by disallowing the night-keeper's fees entirely."

The case of Crofut *v.* Brandt (58 *N. Y.* 106) is relied upon to sustain this proposition. That case, however, simply declares the common-law rule, that where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right (*Comyn Dig.* "Fees, I.).

The case of Flack *v.* State (95 *N. Y.* 461) reiterates the doctrine that the "right of a sheriff to fees is derived from and depends altogether upon the statutes."

The appellant concedes that subdivision 7 of section 3307 of the Code is applicable to his contention, but suggests that it throws considerable doubt upon the binding force of these cases (*supra*). In what particular respect, however, he fails to point out, and we are unable to discover where any exists.

The language of said section is clear and significant; it provides that the sheriff is entitled for his services, "where an execution is stayed after a levy by order of the court or otherwise, . . . to such additional compensation for his trouble and expenses as the court or a judge thereof allows."

We are of the opinion that the items objected to were properly allowed under this section, and that the circum-

stances of the case were amply sufficient to warrant the court in awarding them.

It follows, therefore, that the order appealed from must be affirmed, with costs.

HALL, J., concurred.

ESTATE OF MALLON, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, DECEMBER, 1887.

§ 2667.

Letters of administration—When modified security not taken and limited letters not issued.

The provisions of the Code of Civil Procedure, § 2667—authorizing limited letters of administration and the acceptance of modified security—relate only to a case in which there is a right of action granted by a special provision of law, and not to one in which there is an ordinary claim or debt due an intestate,—as *e. g.*, a claim for salary which is disputed.

(*Decided December* 31, 1887.)

Application for letters of administration and that modified security be taken.

The opinion states sufficient facts.

Petition in person for application.

LOTT, Surr.—This is an application for letters of administration on the estate of said deceased. The petition recites that the deceased was a resident of the city of Brooklyn at the time of his death, and that the assets

consist only of a claim for salary, which is disputed, and the petitioner prays for letters, and that modified security be taken, as it is impracticable to give a bond sufficient to cover the probable amount to be recovered; and that modified security be given and letters issue limited to the prosecution of such claim, but restraining the petitioner from a compromise of such claim, and the enforcement of any judgment recovered thereon.

I find, upon examination of section 2667 of the Code, that it was the intention of the Legislature that the section relate only to a right of action granted by a special provision of law, and not to an ordinary claim, or debts due an intestate.

Motion denied as to modified security.

SIMPSON ET AL. v. ROWAN.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1887.

§§ 3251, 3256.

Costs—When expense of commission to take the testimony of party and witnesses may be taxed.—What term fees taxable in first department.

Where a commission was issued to take the testimony of the plaintiff in an action and of other witnesses residing without the State; the cost thereof is taxable as a disbursement in the action.

Delcomyn v Chamberlain (39 *N. Y. Super.* [7 *J. & S.*] 359), distinguished.

Term fees may be taxed in the first judicial district for terms during which the case is on the calendar of the court, although it is not reached during those terms.

Where it was agreed between the parties to an action that a commission should issue to take the testimony of one of the parties and of witnesses without the State, and that such stipulation should act as a

stay, and thereafter, but before the stipulation was reduced to writing and signed, the plaintiff gave notice of trial and the case, when reached upon the calendar, was put off for the reason that such commission had not been returned,—*Held*, that the plaintiff, upon an offer of judgment being made and accepted after the return of the commission, was entitled to tax term fees for the terms the case was upon the calendar.

(*Decided December* 23, 1887.)

Motion by defendant for a new taxation of costs.

This action was brought by the plaintiffs, who are attorneys residing at San Antonio, Texas, to recover for professional services rendered by them to defendant, who is also an attorney, alleged to be of the value of $1,000. The answer took issue as to the value of the services, and also alleged payment. Shortly after the joining of issue, and before the case was noticed for trial or a note of issue had been filed, it was agreed between the parties that an order should be entered directing that a commission issue to take the testimony of the plaintiffs and of all the witnesses in Texas; and that, pending the execution of such commission, proceedings in the action should be stayed.

Some time after the agreement was made, but before it was reduced to writing, the plaintiffs' attorney served a notice for trial for the April, 1887, term, and filed a note of issue; on April 20, the stipulation that the commission should issue was signed by the parties, and it was thereafter duly issued; the commission was returned on October 15, 1887, and thereafter the defendants noticed the case for trial. In October, prior to the return of the commission, the case appeared on the calendar of the clerk of the court, and was, because of the non-return of such commission, marked, "off." Thereafter, the defendant offered to allow judgment in favor of the plaintiffs to the amount of $200 and costs, and the plaintiffs accepted

such offer and served a bill of costs with a notice of adjustment in which was included the costs of executing the commission and also term fees for the terms the case was upon the calendar, excluding the term during which the offer of judgment was made and accepted; the defendant's attorney appeared before the clerk and objected to these two items, and the clerk overruled the objection, and the defendant took an exception, and thereafter made this motion.

David N. Rowan, defendant in person, for the motion.

Parrish & Pendleton, for plaintiffs, opposed.

TRUAX, J.—The plaintiff in Delcomyn *v.* Chamberlain (39 *N. Y. Super.* [7 *J. & S.*] 359) was the only person examined; here others than plaintiff were examined. It has always been the practice in this district to tax term fees when the case is on the general calendar, although as a matter of fact it is not reached during the term.*

The clerk is sustained: no costs.

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* The following case bears on this question.

ELLSWORTH *v.* PARKES.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY, SPECIAL TERM, NOVEMBER, 1887.

§ 3251.

Costs—What term taxable.

Where an action was noticed for trial at the October circuit in Kings county, and a note of issue filed and the case was tried on November 23; a new circuit having commenced on November 14,—*Held*, that the party succeeding on the trial was entitled to tax one term fee.

(*Decided November* 30, 1887).

Motion by defendant for a new taxation of costs.

This action was brought to recover on a claim for commissions for the selling sash, doors, blinds, etc. Issue was joined May 16, 1887, and

PEOPLE *ex rel.* CRANE *v.* GRANT, SHERIFF, ETC.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM, JANUARY, 1888.

§ 572.

Discharge from imprisonment—When refused, although execution against the person not issued within ten days after the return of execution against the property.

Where an execution against the property was issued on June 4, and returned *nulla bona* June 24, and it appeared that the plaintiff therein had no knowledge of its return until July 20, when she promptly issued execution against the person,—*Held,* that reasonable cause was established for refusing an application for a supersedeas

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the cause was thereafter duly noticed for trial at the circuit in Kings County commencing October 3, 1887. A note of issue for that term was duly filed and the case placed upon the general calendar of the court, but it did not appear on the day calendar until November 18, and was tried on November 23, resulting in a verdict in favor of the plaintiff for $19.93. A new circuit commenced in that county on November 14, and the case would have been reached in its regular order upon the calendar before that day if the parties had not stipulated that the trial should be adjourned; this the attorneys for the respective parties did for their own convenience, filing a written stipulation to that effect with the clerk of the court. The defendant's attorney served a bill of costs with notice of adjustment in which was included two term fees of $10 each; at the time the bill was presented to the clerk for taxation (November 30), the plaintiff's attorney objected to these two term fees, and the clerk disallowed the same. The attorneys thereupon forthwith appeared before the justice presiding at the special term in Kings county and submitted the question arising upon such ruling to him.

I. L. Sink, for defendant and motion.

Hy. Huffman Browne, for plaintiff, opposed.

BARTLETT, J.—One term fee should be allowed.

of the execution against the person, on the ground that it was not issued within ten days after the return of the execution against the property; that if reasonable cause is shown, the court is not bound to grant an application for a supersedeas in such a case.*

Ryan *v.* Crane (12 *N. Y. Civ. Pro.* 431), approved; De Silva *v.* Holden (11 *Id.* 405), followed.

The amendment of section 572 of the Code of Civil Procedure by Laws of 1886, chapter 672,— providing that if a plaintiff issue execution against the person of the defendant within ten days after the return of an execution against the property in certain cases, the defendant must, upon his application, be discharged from custody, if he has already been taken under a mandate against him; in such action it is not incumbent upon the court in such case to discharge the prisoner, where more than ten days has intervened between the issue of the execution of the person and the return of the execution against the property; a reasonable construction of the statute contemplates some failure of vigilance or want of order on the part of the plaintiff, within ten days after the return of the execution against the property.

The word "neglect," in section 572 of the Code of Civil Procedure, as amended by laws of 1886, chapter 672, is used in its strict legal sense, *i. e.*, synonymous with "negligence,"—and means the omission of care and diligence; the omission of that degree of care which a man of any prudence takes in his own concerns.

Where a defendant in an action moves for a supersedeas of an execution against his person on the ground that it was not issued within ten days of a return of an execution against his property, and the application was denied, his remedy, if the order entered is erroneous, is to appeal therefrom, and not by an application to be discharged on habeas corpus.

Where a return of habeas corpus shows that the prisoner is detained by a writ made in an action of which the court confessedly had jurisdiction, the writ should be dismissed and the prisoner remanded.

(*Decided January* 5, 1888.)

Application upon the return of a writ of habeas corpus for the discharge of the relator from imprisonment.

The respondent, Ryan, recovered a judgment for the sum of $10,367.10 in an action in the city court of New York

* See Ryan *v.* Crane, 12 *N. Y. Civ. Pro.* 431, and cases there cited in foot-note.

for damages for a breach of promise to marry, which was entered June 4, 1887. On the same day, execution against the property of the defendant was duly issued to the sheriff of the city and county of New York, who returned it on June 24, 1887, *nulla bona.* On July 20, an execution against the person of the said relator herein was duly issued in said action, under which he was on August 12 arrested and imprisoned. He thereupon moved, in the city court in the action in which the execution was issued, for a supersedeas discharging him from the custody of the sheriff, and his motion was denied, after hearing, without costs. Vide the opinion of the special term of the city court, reported *sub nom.* Ryan *v.* Crane, 12 *N. Y. Civ. Pro.* 431.

Thereafter the relator procured the granting of the habeas corpus upon which this application was made.

Other facts appear in the opinion.

Hart & Price, for relator and application.

Charles Steckler, for respondent, Ryan, opposed.

Cockran & Clark, for the sheriff.

Lawrence, J.—The learned justice of the city court, upon the application for a supersedeas, held, that as it appeared that the execution which was issued on June 4, was returned on June, 24, 1887, and as it further appeared that the plaintiff had no knowledge of the return made by the sheriff until July 20, when she promptly issued execution against the person, reasonable cause was established why the application for a supersedeas should not be granted.

It further appears, by the return to this writ, that an order was duly entered denying the motion for a supersedeas, and that no appeal was taken from said order.

It was held, under the old Code, that a mere omission

to issue execution against the person within the time limited did not constitute the condition upon which the exercise of the power to discharge an imprisoned debtor from custody depended; and that, to warrant the invocation of such power, or its interposition, there must have been a negligent omission to issue such execution (New York Guaranty, &c. Co. *v.* Gleason, 53 *How. Pr.* 122).

It was also held, under the provisions of 2 Revised Statutes, 556, § 36, that the plaintiff's ignorance of the fact that the defendant had been surrendered by his bail was "good cause," within the meaning of the statute, against the discharge of the defendant from custody on account of the plaintiff's neglect to charge him in execution within three months after such surrender (Desisles *v.* Cline, 4 *Robt.* 645). In that case, Chief Justice ROBERTSON states that even under the act of 1813, p. 353, § 12, which was peremptory in its terms (as in § 572 of the Code as amended), it was held that the issuing of a *ca. sa.* before the hearing of the application was an answer to it, and that the ground upon which such decisions were placed was, that the object of the statute was to compel the plaintiff to elect whether he would look to the body or the goods of the defendant, and, having made his election, his right to a supersedeas was gone.

In this case, it is conceded that the execution was issued before the supersedeas was moved for, and whether the old practice authorizing a refusal of the supersedeas, where the execution issued after the service of the motion papers but before the hearing, has been abolished by the Code of Civil Procedure need not be considered (Watt *v.* Healy, 22 *Hun*, 491).

I am, however, of the opinion that under the Code as amended by the 6th section of chapter 672 of the Laws of 1886, it is not incumbent upon the court in every case to discharge the defendant from arrest when the period of ten days has intervened between the return of the execution against the property and the issuing of execution

against the person. If the proper construction of the statute is that contended for by the petitioner's counsel, if the execution against the property should, without the knowledge of the defendant, be returned within twenty-four hours after it was issued, the plaintiff would lose his right to hold the body of the defendant if he omitted to issue execution against the person within ten days after such return. It seems to me to be the more reasonable construction of the statute that the legislature contemplated some failure of vigilance or want of care on the part of the plaintiff within the ten days, and not a mere omission to ascertain whether the sheriff has returned the execution before the expiration of the sixty days allowed by law. The word "neglect" is, I think, used in the statute in its strict legal sense, *i. e.*, as synonymous with "negligence," which is defined to be "the omission of care or diligence;" "the omission of that degree of care which a man of common prudence takes of his own concerns" (2 *Burrill's Law Dictionary*, tit. "Neglect and Negligence;" *Story on Bailments*, § 17; 2 *Stephens Com.* 131).

It certainly cannot be said that the plaintiff was guilty of want of ordinary care, or of that care which a man of common prudence takes in his own concerns, in not ascertaining that the sheriff had returned an execution against the defendant's property on June 24, which had been issued on the 4th, or only twenty days prior thereto, when by the Code the sheriff is entitled to the full sixty days within which to make the return (*Code Civ. Pro.* § 1366; De Silva *v.* Holden, 11 *N. Y. Civ. Pro.* 405).

And although the sheriff would be justified in returning an execution before it runs out, if he has made a fair and honest effort to determine whether the defendant has any property on which he could levy and could find none, it is not so customary for the sheriff to avail himself of this right as to render a plaintiff guilty of neglect in not ascertaining whether such right had been exercised (Cross *v.* Williams, 12 *Weekly Dig.* 426). This construc-

tion is entirely harmonious with all the previous statutes in relation to the granting of supersedeas, and is just and fair both to the plaintiff and defendant. And in this particular instance, no lengthening of the time within which the defendant's liability to be taken into custody results, because it appears that the execution against the person was issued long before the sixty days allowed for the returning of the execution against the property had expired.

I am, however, strongly inclined to the opinion that the words used near the end of the amendment to section 572 of the Code, to wit: "Unless reasonable cause is shown why the application should not be granted," qualify all of the preceding portions of the section, and are not limited to cases where the mandate has not been executed, and that the learned chief justice of the city court was right in holding that if reasonable cause is shown against it, the court is not bound to grant the application, and also that he was right in his conclusion that such reasonable cause appeared in this case (De Silva *v.* Holden, 11 *N. Y. Civ. Pro.* 405). Furthermore, as the defendant has made his application to the city court, I think that his remedy is by appeal from the order refusing the supersedeas, and not by an application to be discharged on habeas corpus.

Again, the return shows that the prisoner is detained by virtue of an execution issued upon a judgment of a court, made in an action of which the court confessedly had jurisdiction (see *Code Civ. Pro.* § 2032).

For these reasons, I am of the opinion that the writ must be dismissed and the prisoner remanded.

CLARK, Respondent, *v.* MOSHER, as Administrator, etc., Appellant.

Court of Appeals, October, 1887.

§§ 820, 971.

Interpleader—When ordered on motion, changes action at law to one in equity.—Court may disregard findings of the jury in an equitable action.

In an equitable action, triable by the court, the trial judge may impannel a jury and submit to it a single question of fact to be answered in the affirmative or negative, and it has also power to disregard the findings of the jury on the question thus submitted, and to find the facts the contrary way, and a judgment entered pursuant to its findings and conclusions is regular.

Where, in an action at law upon a policy of insurance, a third person was, upon the motion of the defendant, interpleaded in its place, and the money in controversy paid by the original defendant into court, —*Held*, that the action was thereby changed from one legal in its nature to an equitable suit and was properly tried as an action in equity; that no right of trial by jury existed in such case, and the court properly submitted a specific question of fact to the jury and afterwards disregarded it and directed judgment according to his own findings and conclusions.

(*Decided October* 11, 1887.)

Appeal by defendant from judgment of the General term of the supreme court in the third department reversing an order of the special term, setting aside a verdict of the jury and directing judgment in favor of the defendant.

This action was originally brought against a life insurance company to recover moneys due on a policy of insurance on the life of the deceased husband of the plaintiff. The company, averring that C. A. Mosher claimed the

money, and that it had no knowledge as to the respective rights of the parties, obtained an order under the Code of Civil Procedure, § 820, allowing it to deposit the amount due on the policy, subject to the order of the court, and interpleading said Mosher as a party defendant in its place. Thereafter, C. A. Mosher died, and A. Mosher was appointed his administrator, and the action was revived against him as such. On the trial, the court submitted a question of fact to the jury, and the jury answered the question affirmatively. The defendant moved to set aside such verdict and that the fact be found in the negative, and the court granted the motion and rendered judgment in the defendant's favor. The plaintiff appealed from the order thereupon entered to the general term of the supreme court in the third department, which reversed such order.

N. C. Moak, for defendant-appellant.

E. Countryman, for plaintiff-respondent.

Rapallo, J.—If the counsel for defendant was right in the position which he took at the circuit,—that this was an equity case triable by the court,—the practice adopted by the trial judge in impaneling a jury and submitting to it a single question of fact to be answered in the affirmative or negative was correct. The judge was also right in holding that he had the power to disregard the finding of the jury on the question thus submitted, and to find the fact the contrary way, and the judgment for the defendant entered pursuant to his findings and conclusions was regular (Carroll *v.* Deimel, 95 *N. Y.* 252). The court at general term held, on the motion to set aside that judgment, that the action was one at law, for the recovery of money only, in which the plaintiff was entitled to a trial by jury; that the judge consequently had no power to disregard the verdict and substitute his

own findings, and that the judgment entered thereon was irregular.

We are of the opinion that the trial judge was right in holding, as claimed by the defendant, that the action was of an equitable nature and triable by the court. The plaintiff had no right of action at law against the defendant, and did not seek to recover any money from him. The money in controversy was in court, having been paid into court by a third party—the Phœnix Mutual Life Insurance Company—under an order made on the application of that company pursuant to section 820 of the Code. The plaintiff had brought an action at law against the company upon a policy of insurance, and the company, admitting its liability on the policy, set up that the defendant's intestate also claimed the amount of the policy, and by this proceeding, in the nature of a bill of interpleader, on payment of the fund into court, the plaintiff was required to substitute the defendant's intestate as defendant, and the object of this action was to determine the conflicting claims of the plaintiff and the defendant to the fund in court. Neither party had any right of action at law against the other; but by this equitable proceeding, authorized by the Code, the insurance company, against whom both claimed a legal cause of action, was discharged, and they were brought together to litigate the question which of them had the better right to the fund in controversy. No right of trial by jury ever existed in such a case.

The order of the general term should be reversed, and that of the special term affirmed, with costs.

All concurred, except Peckham, J., not sitting.

MOREWOOD ET AL. v. CURTIS ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, DECEMBER, 1887.

§ 688.

Attachment—Undertaking to procure discharge of property levied on under.

Where the defendants in an action to procure the discharge of an attachment levied upon property belonging to them, executed an undertaking for $310, the amount of the plaintiff's demand, excluding costs and interest, and it appeared that the property attached was sufficient to secure such demand, with interest and costs,—*Held*, that the court had power to require an undertaking for a larger amount; that an undertaking should be given sufficient to cover the amount of the claim and all possible interest and costs.

(*Decided December* 27, 1887.)

Motion by plaintiffs that the defendants be required to give an increased undertaking in place of one given to secure the discharge of an attachment upon the defendant's property.

The plaintiff sued to recover the sum of $310 and interest and costs, and procured an attachment to be levied upon property of the defendants worth more than enough to secure the same. The defendants, to secure the discharge of said attachment, executed an undertaking in the sum of $310, and the plaintiffs thereupon made this motion.

Martin & Smith, for plaintiffs and motion.

Frank E. Blackwell, for defendants, opposed.

LAWRENCE, J.—Section 688 of the Code provides that the defendant, upon making an application for the dis

charge of an attachment, "must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion."

The objection which is taken to the undertaking in this case is that it is only in a sum equal to the plaintiff's demand, and it is claimed that it should be large enough to cover the interest and costs upon that claim in case the plaintiff should obtain a judgment. It is clearly within the power of the court to increase the undertaking, and, as the plaintiff's counsel stated on the argument that the sheriff had attached property fully sufficient to cover the plaintiff's claim with all possible interest and costs, I think that an undertaking for a greater sum, to be determined on the settlement of the order, should be directed to be given.*

* Upon the settlement of the order directed by the above opinion to be made, the court required an undertaking in the sum of $500.

GUIBERT *v.* SAUNDERS ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, DECEMBER, 1887.

§§ 1331, 1352.

Appeal—Security to stay—When judgment is interlocutory and not final.

Where in an action to declare the title to certain real property to be held in trust for the plaintiff and some of the defendants and for a judgment directing an account of the rents, issues and profits, and that a lease of the premises in question be sold, a judgment was entered directing an accounting and a sale of certain of the premises,—*Held*, that the judgment was an interlocutory and not a final one; that the granting of a stay and the security to be given as a condition thereof was in the discretion of the court.

(*Decided December* 27, 1887.)

Application upon return of order to show cause for an order fixing a sum in which the defendants Whiteman may give security to stay proceedings on appeal herein.

This action was brought to adjudge that the defendants Whiteman held the title to certain real estate in trust for the plaintiff and some of the defendants; that they account for the rents, issues and profits, and that the lease of the premises in question be sold. Judgment was given in favor of the plaintiff against the said defendants by Justice LAWRENCE in accordance with the prayer of the complaint, after trial before him at special term, and an appeal taken to the general term of this court, and said judgment reversed on the rejection of certain evidence and a new trial ordered. The second trial was had before Justice PATTERSON, and again judgment entered in favor of the plaintiff against the defendant Whiteman, decreeing,

among other things, an accounting and that said premises be sold. An appeal has been taken by the defendants Whiteman to the general term of this court. The attorney for said defendant makes affidavit that he believes that the general term did not on the first appeal examine all the points raised, and that, if they decline to examine them on this appeal or give a decision in favor of the plaintiff, he intends to go to the court of appeals, and believes that, in so far as the judgment orders a sale of the real estate in question it is a final judgment and appealable to the court of appeals; that the case on appeal herein has been settled and is ready for the printer, and said defendant expects to get ready in time to have the appeal taken herein to the general term of this court argued in January, the next term thereof.

Elliott Williams, for defendant and motion.

Robert S. Rudd, for plaintiff, opposed.

Lawrence, J.—The judgment in this case is an interlocutory and not a final one (King *v.* Barnes, Court of Appeals 36 *Alb. L. J.* 490, 491). Sections 1331 and 1352 of the Code of Civil Procedure apply to appeals from final judgments and the security to be given thereon. The security to be given in this case is to be determined under the provision of section 1351 of the Code, which permits the court to make an order in its discretion directing a stay, and authorizes the court from time to time to modify such order upon such terms as to security or otherwise as justice requires.

Under that section, I shall grant a stay of that portion of the judgment which directs the sale of the premises, but the proceedings on the accounting must go on. The security to be given as a condition on granting the stay, will be an undertaking in the usual form in the sum of $2,000.

WAINWRIGHT, Judgment-creditor, *v.* TIFFINY, Judgment-debtor.

In re Examination of THE TIFFINY CHEMICAL COMPANY.

City Court of New York, Special Term, December, 1887.

§ 2432 *et seq.*, 2441.

Supplementary proceedings—Examination of domestic corporation as a third person—Production of books, etc.

In a proceeding supplementary to execution taken against a domestic corporation on the ground that it has property of the judgment debtor, the production of the books of the corporation can be obtained, if necessary, by the service of a subpœna *duces tecum* on the officer of the corporation having power to comply with its mandates; but their production cannot be secured by the service of such a subpœna on a mere employee having custody of the books as such, but he is not an officer, trustee, director or stockholder of the corporation and who has no control thereof.

(*Decided December* 17, 1887.)

Motion to vacate order for the examination of the Tiffiny Chemical Company as a third party, and directing Walter C. Tiffiny, as manager thereof, to produce the books of the corporation.

The plaintiff, Wainwright, having recovered a judgment against the defendant, Walter C. Tiffiny, procured an order for the examination of the Tiffiny Chemical Company as a third parson having property of the judgment debtor in proceedings supplementary to execution, which order was directed to Walter C. Tiffiny, who was alleged to be the manager of the corporation, and who was directed

thereby to produce certain books of the corporation. The said Walter C. Tiffiny appeared by counsel on the return of the order, and,—upon an affidavit stating that he was not an officer, trustee, director or stockholder of the corporation, but a mere employee; that the books of the corporation, while in his custody, were not under his control, but were under the control of W. Stanley Camp, the treasurer of the corporation, and Daniel D. Sherman, the secretary thereof; and that he was not the book-keeper of the corporation; that his duties as such employee were solely the general superintendence of the sales, collections, employees, manufactures and analytical chemical work of the said Tiffiny Chemical Company,—moved to vacate said order.

——— ———, for Walter C. Tiffiny and motion.

Frederick William Sherman, for judgment creditor, opposed.

McAdam, Ch. J.—The judgment creditor seeks to examine a domestic corporation as a third person having property of the judgment debtor. The order is directed to William C. Tiffiny, who is alleged to be the manager of the corporation, and he is required to produce certain books of the corporation. Tiffiny swears that he is not an officer, trustee, director or stockholder of the corporation, but a mere employee. The creditor may be entitled to the books, but he should obtain their production, if necessary, by the service of a subpœna *duces tecum* on the officer having the power to comply with its mandate (Prudens *v.* Tollman, 6 *N. Y. Civ. Pro.* 360; Knowles *v.* De Lazare, 8 *Id.* 386).

The portion of the order as to the books will be vacated. No costs.

ZIMMERMAN *v.* FISCHER.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1887.

§ 656.

Attachment.—What property perishable and should, therefore, be sold.

Where two horses were levied upon under an attachment,—*Held*, that an application for leave to sell them as perishable property should be granted.

It seems, that any property inherently liable to perish or decay is in its nature perishable: that fish, fruit and the like are perishable whenever it is manifest that the purpose of an attachment cannot be vacated before they will decay; that live animals which are liable to perish, waste, or be greatly reduced in value by keeping, or which cannot be kept without great and disproportionate expense, are also perishable, and, when levied upon under an attachment, should be sold as perishable property

(*Decided December* 15, 1887.)

Application for leave to sell as perishable property two horses levied upon under an attachment.

This action was tried to recover upon contract. An attachment was issued therein on the ground that the defendant was a non-resident of the city and county of New York. The sheriff, under the attachment so issued, levied upon two horses, and thereafter applied for leave to sell them, on the ground that they were perishable.

Samuel D. Levy, for plaintiff and application.

D. S. Riddle, for defendant, opposed.

McADAM, Ch. J.—Any property inherently liable to perish or decay is in its nature perishable (Fisk *v.* Spring, 1 *N. Y. Civ. Pro.* 178). Fish, fruit and the like are perishable whenever it is manifest that the purpose of the

attachment cannot be effected before they will decay (Davis *v.* Ainsworth, 14 *How. Pr.* 347; Wallace *v.* Baker, 8 *Vt.* 440). Live animals which are liable to perish, waste or be greatly reduced in value by keeping, or which cannot be kept without great and disproportionate expense, are also perishable (Anonymous, 18 *N. J. L.* [3 *Harr.*] 26; Megee *v.* Beirne, 39 *Pa. St.* 50; Byrnes *v.* Robinson, 19 *Weekly Dig.* 454; Note to 1 *N. Y. Civ. Pro.* 387).

Application for leave to sell, as perishable property, the two horses levied on under the attachment, granted (*Code Civ. Pro.* § 656). No costs.

KAUFMAN *v.* KEENAN.

City Court of New York, Special Term, December, 1887.

§ 66.

Attorney's lien—When prevents set-off of judgment.

A judgment for costs recovered in an action upon an undertaking given in another action cannot be set off against a judgment for costs in the latter action to the prejudice of the attorney for the judgment creditor therein.

(*Decided December* 14. 1887.)

Motion by defendant to set off against the judgment entered herein so much of a judgment entered in the court of common pleas, in favor of Patrick Keenan and Gerald Fitz Gibbon against the plaintiff herein, and assigned to the defendant, John Keenan, as may be necessary.

This action was tried before Justice McAdam and a jury, and resulted in a verdict for the plaintiff, and judgment was entered on snch verdict in favor of the plaintiff against the defendant for the sum of $462.34. From said

judgment the defendant appealed to the general term of this court, where said judgment was affirmed. An appeal was taken from the judgment of the general term thereupon entered to the court of common pleas of the city and county of New York, where said judgment was reduced to $110. Thereafter, the judgment so reduced was paid, and the same canceled and discharged of record; but the judgment for the costs of the appeal to the general term of the city court remain unpaid. In the month of April, 1884, plaintiff commenced an action in the court of common pleas against Patrick Keenan and Gerald Fitz Gibbon to recover the sum of $86.34, an undertaking given by said Keenan and Fitz Gibbon for the defendant on his appeal herein from the judgment of trial term to the general term of this court. Issue was joined and the cause tried, which resulted in a dismissal of the complaint on the merits, and judgment for the defendant for the sum of $108.02. Plaintiff took an appeal from said judgment to the general term of the court of common pleas, which resulted in a reversal and an order granting a new trial. Subsequently, in the month of June, 1887, the cause was again tried, and resulted in a judgment again in favor of said Fitz Gibbon and Keenan, and against the plaintiff, David Kaufman, herein, for the sum of $264.49, which judgment was assigned to John Keenan, the defendant in this action. Afterward, the plaintiff, David Kaufman, through his attorney, who appeared for him in all the proceedings herein, issued an execution to the sheriff upon the said judgment for $86.34, and said sheriff threatened to enforce said judgment. The defendant, upon an affidavit setting forth these facts, and that the plaintiff, David Kaufman, is irresponsible, and said judgment of $264.49 is still unsatisfied, moved that an order be entered in favor of the plaintiff, and against the defendant, for the sum of $86.34, and that judgment recovered by Gerald Fitz Gibbon and Patrick Keenan against the plaintiff, David Kaufman, for the sum of $264.49, and assigned to the defend-

ant, John Keenan, or so much thereof as might be necessary, be allowed and set-off as against the plaintiff's judgment herein, and, when so allowed a set-off, the judgment herein be canceled and discharged.

Joseph E. Newburger, for defendant, Keenan, and motion.

Frederick Hemming, attorney for plaintiff, opposed.

McAdam, Ch. J.—The judgment for costs was recovered in this court. The judgment assigned to the defendant was recovered in another action. The application of the defendant to set off this judgment, to the prejudice of the attorney who owns the judgment for costs, denied (Naylor *v.* Lane, 5 *N. Y. Civ. Pro.* 149). No costs.

OBART, Respondpnt, *v.* SIMMONS SOAP COMPANY, Appellant.

Supreme Court, First Department, General Term, October, 1887.

§§ 992, 995, 996, 999.

Trial—Refusal to postpone, when requires reversal of judgment.

Where, in an action to recover damages for personal injuries received by the plaintiff while an employee of the defendant while riding upon an elevator upon defendant's premises, it appeared by affidavit that the defendant expected to have the testimony of one P., who resided in New Jersey and was then the superintendent of defendant's factory; that said P. had stated to the men who were employed in said factory, including the plaintiff, that it was against the rules of the factory to ride on the elevator, and ordered the men not to ride thereon, and warned them against so doing; and it also appeared by affidavit of a physician that said P. was under said physician's care, suffering from

remittent fever; that he had been threatened with pneumonia, and was not able to leave his house or resume his usual occupation, and would not be for some time; and that if he was to leave his house and go to court to testify as a witness in the case, the exposure might bring on a relapse, but that he could safely do so in two or three weeks,—*Held*, that an application upon such proof to adjourn the trial of the case was improperly denied; and that, where such application was denied and an exception to the denial duly taken, a judgment rendered against the defendant, after a trial then had, at which such witness was not present and examined, should be reversed and a new trial ordered.

(*Decided October* 27, 1887.)

Appeal by defendant from a judgment in favor of the plaintiff, and from an order denying a motion for a new trial upon the minutes.

This action was commenced in June, 1885, and was brought to recover damages for personal injuries sustained by the plaintiff on May, 26, 1884, while employed by defendant as a laborer in its soap factory, in the city of New York, through the breaking of the rope by which an elevator in defendant's said factory was hoisted, and the falling of such elevator while the plaintiff was riding therein. The action was tried at a circuit of the supreme court, held in the county of New York, on December 16 and 17, 1886, and a verdict was rendered in favor of the plaintiff for $2,000, upon which judgment was entered on December 22, 1886, from which judgment, and an order denying the defendant's motion for a new trial, this appeal was taken. On the case being called for trial, on December 16, 1886, the defendant moved to postpone the trial, on the ground of the absence of witnesses, and on said motion read the affidavit of one J. L. Seward, a physician, and the affidavit of A. D. Simmons, the president of the defendant. The affidavit of the physician, omitting title, venue, signature, and jurat, is as follows:—"J. L. Seward, being duly sworn, deposes and says:—

"I. That deponent is a physician, and resides in Orange,

in the State of New Jersey; that deponent is acquainted with John H. Pettinger, who resides at Orange aforesaid.

"II. That said petitioner has been under deponent's professional care during the last three weeks, suffering from remittent fever; and that he has been threatened with pneumonia; that he is not able to leave the house or to resume his usual occupation, and will not be for some time to come.

"III. That if said Pettinger were to leave his house at this time and to go to New York to testify in court as a witness in this case, the exposure might bring on a relapse with very serious results.

"IV. Deponent further says that said Pettinger can safely attend court in about two or three weeks."

The affidavit of Simmons, the president of the defendant, set forth that he was the president of the defendant, and "that this action is brought to recover damages for injuries alleged to have been sustained by the plaintiff, while an employee in the defendant's factory, by the breaking of the elevator-rope when the plaintiff was on the elevator, the same falling and injuring the plaintiff. The defense, among other things, is that the elevator was a freight, and not a passenger elevator, and it was a general rule in the factory that the men should not ride on the elevator, and that the plaintiff was notified of that rule and ordered not to ride on the elevator; that deponent has stated the defense in this action to Henry Stanton, the defendant's attorney, who resides at 43 West Twenty-sixth street, New York city, and deponent is advised by said attorney, after such statement made as aforesaid, that the defendant has a good and substantial defense to this action upon the merits; that this action was tried in February last, before Mr. Justice Lawrence and a jury, and resulted in a disagreement of the jury, the jury standing ten for the defendant and two for the plaintiff; that John H. Pettinger, at the time of the action referred to, was the superintendent at the defend-

ant's factory; that said Pettinger has stated to said deponent that on the trial of this case he will testify that before the time of the accident he stated to the men in the factory generally that it was against the rules of the factory to ride on the elevator, and warmed them against riding on the elevator, and that he made this statement in the presence and hearing of the plaintiff; that he, the said Pettinger, a few days before the accident, examined the rope of the elevator, and found it to be in an apparently good condition, and this deponent further says that he stated to Henry Stanton, the defendant's counsel, what he expects to prove by said Pettinger, and he is advised by the said Henry Stanton after such statement, made as aforesaid, that the said Pettinger is a necessary and material witness for the defendant upon the trial of this action, and that the defendant cannot safely go to trial without the evidence of said Pettinger; that said Pettinger is now in the employ of the defendant corporation as its superintendent; that there was no necessity to subpœna him as a witness for the defendant upon the trial of this case, for he at all times held himself ready to attend court and to testify whenever this case was reached, and is only now prevented from attending court by his illness." The affidavit also set forth that the testimony of William R. Taylor was necessary, and that said Taylor could not attend the trial on said December 16, and contained letters and telegrams confirming the same in this particular. This wituess subsequent, during the progress of the trial, attended court and was sworn as a witness for the defendant.

Henry Stanton, for defendant-appellant.

The exceptions to the denial of the motion to postpone the trial were well taken. The denial of the motion was error, for which judgment should be reversed. I. The affidavit made out a clear case for a postponement, on account of the absence of the witness Pettinger. It was

an arbitrary exercise of power to force the defendant to trial. He was a most important witness for the defendant upon the vital points in the case,—viz., as to warning the plaintiff not to ride on the hoist, and as to the condition of the rope; and the testimony of the plaintiff's witnesses and fellow-workman Nolan shows that Pettinger had charge of these two men at the time of the accident, and gave them orders concerning the loading of the hoist, and Ingraham's testimony shows that Pettinger examined the elevator just before the accident; and Simmons' testimony shows that Pettinger communicated to the men, the rule about riding on the elevator. II. The denial of the motion to postpone was error for which the judgment should be reversed, and the mode of bringing up the error for review, adopted in this case, is correct practice,—viz., to except to the denial of motion, put the affidavits in evidence, and then print the affidavits, and present the exception in a case on appeal from the judgment. Gregg *v.* Howe, 37 *N. Y. Super.* (5 *J. & S.*) 420; Gallaudet *v.* Steinmetz, 45 *N. Y. Super.* (13 *J. & S.*) 239.

S. R. Ten Eyck (*Ten Eyck & Remington*, attorneys), for plaintiff-respondent.

The motion to postpone the trial was properly denied. The witness, John H. Pettinger, whose absence furnished the only ground for seeking the delay, resides at Orange, in the State of New Jersey. The affidavits do not show that Pettinger had been subpœnaed or had promised to attend the trial of this action, and there is nothing to show that he would have done so, even if he had not been sick, unless the bare fact that he was employed by the defendant, is considered sufficient evidence of that fact. Under these circumstances, we claim that there was no good reason to postpone the trial. The evidence of the witness should have been taken on commission, as he was a non-resident of the State; and no facts are stated to show that the defendant expected or

had any right to expect him to attend the trial of this action. In addition to this, the case had been on the day calendar of the court for trial for several weeks, and the defendant's counsel had always answered ready, and no claim had ever before been made that Pettinger was sick, or that he was desired as a witness for the defendant. The judge before whom the trial was had undoubtedly thought that the application to postpone the trial was not made in good faith, and therefore denied it. There is a still stronger reason to uphold the ruling of the trial court. The facts that were expected to be proved by Pettinger are set forth in the affidavit of Alonzo B. Simmons, the president of the defendant. On the trial of the action, the same facts were proved by other witnesses, so that the absence of Pettinger did not prejudice the defendant. His evidence would have been merely cumulative. Under such circumstances, the discretion of the court was properly exercised in refusing the motion to postpone the trial. Ten Broeck *v.* Traveler's Ins. Co. 25 *N. Y. Weekly Dig.* 250; McKinsley *v.* McKee, 7 *West. Rep.* 254.

Per Curiam.—The affadavits upon which the defendant moved the court to postpone the trial were uncontradicted, and, in the absence of any denial of the facts alleged therein, established a proper case for an adjournment to some future day. Under these circumstances, it was error for the court below to deny the motion, and on this ground the judgment must be reversed, and a new trial ordered, with costs to abide the event.

MORRISON *v.* THE NATIONAL RUBBER COMPANY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1888.

§§ 431, 432, 440.

Service of summons—When order for service without the State on foreign corporation, sufficient.

Where an order providing for service of the summons in an action upon a foreign corporation without the State, did not designate the particular officer upon whom service was to be made, and service was thereafter duly made upon the secretary of the corporation without the State,—*Held,* that the failure to direct the particular officer upon whom service should be made, did not vitiate the order or render the service null and void; and that substantial compliance with the provisions of the Code of Civil Procedure was all that was required. (*Decided January* 3, 1888.)

Motion by the defendant, The National Rubber Company to vacate the service of the summons herein, and the order upon which the same was made, on the ground that such order does not designate the particular officer of said defendant upon which service without the State was to be made.

The defendant is a foreign corporation, organized under the laws of the State of Rhode Island, and having its principal office at Bristol, in that State. The plaintiff applied for and procured an order for the service of the summons herein upon said defendant, either by publication or by service upon said defendant without the State,—to wit, at Bristol, in the State of Rhode Island,—upon the ground that the said defendant was a non-resident of the

State, being a foreign corporation, and an order to that effect was duly made; thereafter the summons was served at Bristol, Rhode Island, together with a copy of the complaint, the order directing the service and the usual notice; the defendant thereafter appeared for the purpose of making this motion.

Billings & Cardozo, for the plaintiff and motion.

L. C. & J. B. Ashley, for defendant, opposed.

LAWRENCE, J.—The service of the summons in this case was, in point of fact, made upon one of the officers of the corporation specified in sections 431, and 432 of the Code of Civ. Pro. to wit: the secretary. Thus the provision of section 440 of the Code was in fact complied with; and the corporation was personally served without the State. A substantial compliance with that provision is all that is required. (Brooke *v.* Saylor, 44 *Hun*, 554–555; Loring *v.* Binney, 8 *N. Y. Civ. Pro.* 297), and the failure to designate the particular officer upon whom service should be made in the order, does not, in my opinion, vitiate it or render it null and void.

Motion to vacate order and set aside service denied, with costs.

CLAFLIN ET AL. *v.* DU BOIS ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1888.

§ 797, subd. 3.

Service of papers—When insufficient.

Throwing papers into an attorney's office through the transom over the door, the office being closed, is not good or sufficient service thereof upon such attorney.

(*Decided January* 6, 1888.)

Motion by defendant that service of notice of appeal and of other papers be confimed.

This action was brought by the plaintiffs to recover possession of certain goods alleged to have been wrongfully taken from their possession by one Walter Scott, the assignee of the defendant, Du Dois. Judgment was entered in favor of the plaintiffs against the defendant, and a copy of the judgment, with notice of entry thereof, was duly served upon the plaintiffs' attorney. On the last day for so doing the defendant claims to have served notice of exception to the findings and to the refusal of the court to find herein, also notice of appeal from the judgment, a copy of an order, and of the defendants' proposed case on appeal, in the following manner: viz.: by throwing the same over the open transom of the outer door of the office of the plaintiffs' counsel (whom it was claimed had been delegated to receive papers for the plaintiff's attorney), while said door was closed. The defendant's attorney asserted that a law student and a clerk employed in his office went to the office of said counsel, tried to open the outer door of said office, and, being unable to do so, and no person coming to the door, although a great deal of noise was made by said clerk, threw the papers into the office over the door of the same, and, looking through the translucent, glass doors of the office, saw them as they were falling towards the floor; that thereupon one of the clerks boosted the other up so that he could look upon the top of the door, and he did so, and saw that none of said papers had lodged on the top of anything about the door or the transom; the plaintiffs' counsel, in opposition to the motion, presented an affidavit stating that no notice of appeal and none of the other papers so attempted to be served had been received by him or at his office, and no trace thereof had been found by anyone in his office; that, if such service was made, it was made after four o'clock in the afternoon, and after he and everyone in his office had left for the day; that, when notified

by the attorney for defendants of the service of such papers, he had denied their receipt, and was called upon by said attorney who offered to furnish him with copies of the papers so claimed by him to have been served; and that he refused to receive the same, and notified them that his position was that the same had never been served, and that no appeal was taken.

Marston Niles, for defendant and motion.

S. F. Kneeland (*Winchester Hall*, attorney), for plaintiffs, opposed.

McAdam, Ch. J.—Mr. Kneeland was not the plaintiffs' attorney, and swears that he never received the notice of appeal. Assuming, however, that by some arrangement with the plaintiffs' attorney, service on Kneeland would have been sufficient, and that, Kneeland's office not being open, the papers were thrown into his office through the transom over the door, this was not a good service. (*Code Civ. Pro.* § 797, subd. 3; Haight *v.* Moore, 37 *N. Y. Super.* [5 *J. & S.*] 294).

Motion denied, with $10 costs.

AYRES *v.* THE VILLAGE OF HAMMONDSPORT.

Supreme Court, Fifth Department, Steuben County, Special Term, September, 1887.

§§ 1015, 1180.

Verdict—Motion to set aside because of use of improper influence on jury—Waiver of objection—Use of juror's affidavit—Power of referee appointed on motion.

The acceptance of a jury without challenge is a waiver of the right to raise, upon a motion to set aside a verdict, the objection that a juror was subjected to influence which may have affected the verdict.[1, 6]

Clark *v.* Van Vrancken, (20 *Barb.*, 278);[2] Hayes *v.* Thompson (15 *Abb. Pr. N. S.* 220); [3] Cain *v.* Ingham (7 *Cow.* 478); [4] Jenkins *v.* City of Hudson (8 *N. Y. Civ. Pro.* 70),[5] followed; Denn *v.* Driver (1 *Coxe* [*N. J.*] 166), distinguished. [6]

Outside of error or mistake, irregularity or misconduct on the part of the jury, affidavits of jurors are competent in support of a motion to set aside a verdict on the ground that it was produced by improper and illegal influence brought to bear upon the jury or some of them.[8] The cases, on the subject, reviewed. [7,8]

A party moving to set aside a verdict and for a new trial, on the ground of improper and illegal influence being brought to bear upon the jury, should show that he did not know of the misconduct complained of in season to object before the case was concluded; and, where he had knowledge of the misconduct but failed to call the attention of the court thereto, the objection cannot thereafter be taken. [9]

Admissions and statements made by a juror are not competent to impeach a verdict. [10]

The findings of a referee appointed upon a question of fact arising upon a motion, are not conclusive upon the court; they are but to inform the conscience of the court, and may be adopted or disregarded. [11]

Where a reference is directed to determine and report upon questions of fact arising on a motion, it is the trial of the questions so referred, and the referee has power to and should decide upon the admissibility of evidence. [12]

Scott *v.* Williams (23 *How. Pr.* 393; S. C., 14 *Abb. Pr.* 70); Van Etten *v.* Hasbrouck (4 *N. Y. State Rep.*, 803), distinguished. [13]

(*Decided September* 7, 1887.)

Motion by plaintiff to set aside a verdict rendered in favor of the defendant, and all proceedings thereunder, on the ground that the verdict was produced by improper and illegal evidence brought to bear upon the jury or some of them.

This action was tried at the Steuben county circuit, held at Bath, in January, 1886, and a verdict rendered in favor of the defendant. Upon the hearing of the motion, the court upon its own motion ordered a reference to take

evidence, determine and report upon the following questions of fact arising on such motion, viz.:

First: "Did the defendant, or any person or persons on its behalf or interest, attempt, improperly or illegally, to influence the jury who tried the action, or any of them, in regard to the verdict herein?"

Second: "If there was such an attempt, is there any reason to suspect that it may have had any influence upon the verdict?"

Upon the hearing before the referee, a large amount of evidence was taken, and it, together with the depositions of one Charles Rarick, taken before another referee under a stipulation between the attorneys, was returned with this report, in which he decided both questions in the affirmative. The motion then came before the court upon such report and the original affidavits.

J. F. Parkhurst, for plaintiff and motion.

Monroe Wheeler and *Rumsey Miller*, for defendant, opposed.

Angle, J.—When this motion first came on to be heard upon affidavits, the counsel for the defendant, under a written stipulation between the attorneys which provided that either party should have the right to make and raise in writing any objection, preliminary or otherwise, to the motion papers, or any part thereof, and to move to strike out any affidavit or portion thereof of the other party, and that the court should note its decision, and either party should be deemed to have and be allowed an exception to every decision overruling any of his or its objections, or denying any of his or its motions, made certain preliminary objections, which are, in brief:

First. That the notice of motion does not specify any irregularity which is ground for setting aside a verdict; and, Second. The notice does not specify any irregularity,

or sufficiently specify the irregularity complained of. These objections were overruled when the order of reference was made.

The counsel for the defendant also asked that each and every affidavit should be limited to the issue, whether the verdict was procured by improper and illegal influences brought to bear upon said jury or some of them. This request was also denied in the making of said order of reference.

The counsel for the defendant also objected to certain affidavits and portions of affidavits specifying the name of the deponent and the subject matter to which the objectionable portions related and stating the grounds of the objection, and he also asked that the affidavits of jurors should be limited and restricted as to the purposes for which they could be used. The objections do not specify by line, paragraph or sentence the portions objected to. It is doubtful to what extent the papers upon a special motion can, by objections raised on the hearing and by the decision, be made to partake of the character of a bill of exceptions, or of a case and exceptions, and I shall not examine the practice in that regard. I will, however, pass upon the leading propositions involved in the objections of defendant's counsel.

[1] First. Is the acceptance of a juror without challenge a waiver of a right to raise upon a motion of this kind the objection that he may have been subjected to influences which may have had an influence upon the verdict?

[2] In Clark v. Van Vrancken (20 *Barb.* 278), the question was whether a defendant, who failed to appear before a justice of the peace or to make any objection to jurors, waived the objection that jurors were not competent by reason of not having the property qualification required by the statute; and in deciding the case, the justice writing the opinion of the general term says (pages 281, 282): "On the whole, I am satisfied that an omission to challenge is a waiver of all objection to a

juror in like manner as an omission to plead a defense is a waiver of the defense."

The only point really presented and decided in Clark v. Van Vrancken was, whether the omission to challenge was a waiver of the incompetency of a juror by reason that he had not the requisite property qualification.

['] The case of Hayes v. Thompson (15 *Abb. N. S.* 220) was a motion to set aside a verdict at circuit on the ground that one of the jurors was disqualified by consanguinity, and the court, at special term, say, in denying the motion: "Great latitude is allowed at the circuit for a party to determine what jurors are qualified as indifferent between the parties (3 *R. S.* 5th ed. 718). Parties who do not avail themselves of that latitude and the rules established to secure as jurors persons who are *strictly qualified*, in the absence of proof that injustice has been done, should be held to waive objections or causes of challenge which might have been ascertained with diligence (6 *Wend.* 388; 17 *Johns.* 133; 7 *Cow.* 478; 5 *N. Y.* 531). No such injustice has been shown in this case, and the motion to set aside the verdict is denied, with ten dollars costs." It appears from a note to this case that it was affirmed at general term.

['] The above case, cited from 7 *Cow.* 478, is Cain v. Ingham, where the motion was to set aside a verdict by reason of the affinity of a talesman. As an excuse for not challenging, it was shown that the party moving was old, infirm, and very deaf, so as not to be apprised that the talesman was called till after he was sworn and it was too late to challenge him. The court, after deciding that there was no subsisting affinity which could operate as the principal ground of challenge, say: "It is going too far to say that matter of mere evidence upon a challenge to the favor, matter which is undefined and infinitely diversified and multifarious, shall be cause for setting aside a verdict when it is accompanied with no evidence that the juror is in fact influenced from the cause."

[*] See, also, Jenkins *v.* City of Hudson (8 *N. Y. Civ. Pro.* 70), and cases cited in opinion. I am led to the conclusion that, under the authorities, the waiver claimed by the defendant's counsel exists in the present case, and that his objections arising thereon are well taken.

[*] The case of Denn *v.* Driver (1 *Coxe, N. J.* 166), where the court held that the affidavit of a juror was admissible to prove a misconduct in a defendant previous to the trial, tending to influence the juror, does not disclose that the objection of waiver was raised.

[*] Second. It is said, in Williams *v.* Montgomery (60 *N. Y.* 648), a case reported in memorandum, that the court reaffirmed "the principle that jurors cannot be heard, by affidavit or otherwise, to impeach their verdict" (Coster *v.* Merest, 3 *Brod. & Bing.* [*Eng. C. P.*] 272; Clum *v.* Smith, 5 *Hill*, 560). The motion there appears to have been made "upon affidavits, among them affidavits of jurors, and upon the grounds of misconduct of the defendant and others interested with him in conversing with jurors, of misconduct of jurors and of the constable having them in charge." The report is not a satisfactory one, as the language of the court is not given. The case cited from 3 *Brod. & Bing.* gives us no light. The head-note to it is: "Where it was sworn that handbills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of trial, the court would not receive from the jury affidavits in contradiction." It appears from the case that counsel "offered affidavits from all the jurymen that no such placard had been shown them," and the court excluded the affidavits. This case of Coster *v.* Merest was decided in 1822, and the supreme court of this State, as early as in 1809, in Dana *v.* Tucker (4 *Johns* 487), had held the other way, and said that the affidavits of jurors might be admitted in exculpation of jurors and in support of their verdict, and this case has ever since been followed in this State.

An examination of Clum *v.* Smith (5 *Hill*, 560), also cited in 60 *N. Y.* 648, *supra*, and the cases cited in the opinion, show that the doctrine of that case, and the English cases there cited, is that the affidavits of jurors are not receivable to impeach their verdict for mistake or error on the merits, nor for irregularity on the part of the jury, and to this extent the objections of defendant's counsel to affidavits, and portions of affidavits, are sustained. But the affidavits of jurors are admissible to show the misconduct of others (Reynolds *v.* Champlain Transportation Co., 9 *How. Pr.* 7; Thomas *v.* Chapman, 45 *Barb.* 98.)

The case of Woodward *v.* Leavitt (107 *Mass.* 453) contains an elaborate discussion of this question, and an abstract of many authorities, and the court, say, on page 466: "A juryman may testify to any facts bearing upon the question of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind," and, in Johnson *v.* Witt (138 *Mass.* 80), the court say: "It is proper to say, to prevent misconstruction, that while the testimony of jurors was admissible to prove what Allyn said to them as to what took place out of the jury room, it was not competent to prove, by their testimony, what effect was produced upon their minds."

See, also, Denn *v.* Driver (1 *Coxe*, 163, above cited).

[*] My conclusion is that, outside of error or mistake, irregularity or misconduct, on the part of the jury, affidavits of jurors are competent. In coming to this conclusion, I am aware that the above cited case of Thomas *v.* Chapman, perhaps, differs from Baker *v.* Simmons (29 *Barb.* 198), and Hager *v.* Hager (38 *Id.* 92, 102), as to whether misconduct on the part of the officer in charge of the jury is ground for disturbing a verdict. In Hager *v* Hager (38 *Barb.* 102), the opinion at general term says: "I do not deem it necessary to discuss the question whether the affidavits of jurors are admissible upon questions . . . including the actions and conduct of others toward them."

[9] Third. It is also objected that the counsel for plaintiff knew at or about the time it transpired of a certain occurrence at the Nichols house, but as he neglected to call the attention of the court to it or to take any action with regard thereto, he cannot now be heard. I hold the objection well taken (Pellitier *v.* M. L. & L. Co., 2 *New Eng. Rep.* 453 [Me. 1886]). There is also in the same State a recent case, which seems to hold that a party moving for a new trial should show by his moving papers that he was not informed of the misconduct of which he complained, in season to have made his objection before the cause was committed to the jury (Townsend *v.* Kelly, 2 *New Eng. Rep.* 428 [Me. 1886]; see, also, Mergentheim *v.* Indiana, 5 *West. Rep.* 851, 852 [Ind. 1886]). The moving affidavit of plaintiff's attorney states: "That most of the facts which are set forth in the moving papers upon this motion were discovered within thirty days before the making of such affidavit."

[10] It is abundantly settled that admissions or statements made by a juror are incompetent to impeach a verdict (Clum *v.* Smith, 5 *Hill*, 560, 563; Warren *v.* Spencer, 3 *New Eng. Rep.* 111 [Mass. 1887]).

Upon the coming in of the report of the referee, it appears that most of the persons making the affidavits on which the motion was first heard, were examined as witnesses before him. It also appears from his report that on the hearing before him he "ruled and decided that under the aforesaid order of reference," I had no power or authority to pass upon questions of competency or admissibility of evidence offered by the respective parties, and pursuant to such ruling and decision, did receive all evidence offered by either party, and herewith return the same to the court, in connection with my report, noting in their proper places all objections taken thereto, with the grounds of objection, as stated by counsel."

Under the conclusions to which I have above arrived, much of this evidence was incompetent, and there is noth-

ing before me showing whether or not the referee included such evidence in his consideration of the questions, except that he certifies and reports "that upon the evidence produced before me upon such hearing, I am of opinion and do find and decide" upon said questions, as stated in the report.

The reference in this case was not simply to take and report the evidence, but it was under the last clause of section 1015 of the present Code, to determine and report upon the questions of fact which arose upon the motion, as well as to report the evidence taken, and the referee appears so to have understood it, for he does "find and decide" those questions.

[11] "The finding of a referee upon a question of fact arising upon a motion, is not conclusive upon the court. It is but to inform the conscience of the court, and may be adopted or disregarded" (Marshall *v.* Meech, 51 *N. Y.* 141).

[12] After a somewhat critical examination of subdivision 3 of section 271 of the Code of Procedure and the cases decided thereunder (it being the original from which the last clause of section 1015 of the present Code is derived), I am strongly of the impression that where the reference is to determine and report upon questions of fact it is a trial of the questions so referred, and that, upon such a reference, the referee has power to, and should as an incident to the power to determine, decide upon the admissibility of evidence (Dwight *v.* St. John, 25 *N. Y.* 203).

[13] The case of Scott *v.* Williams (23 *How. Pr.* 393; 14 *Abb. Pr.* 70), before Justice Leonard, at chambers, was not a reference to determine a question of fact, but was regarded as a reference to take the evidence. Van Etten *v.* Hasbrouck (4 *N. Y. St. Rep.* 803), at general term, in third department, was simply a reference to take evidence, but the court, on page 807, makes the distinction

between such an order and an order to determine a question of fact which I have above noticed.

It being ambiguous whether the referee excluded from any weight in his determination the incompetent evidence which he felt constrained to take and report, I have gone over the evidence and examined the case upon the merits as an original question upon the facts without regard to the determination by the referee.

After excluding all the evidence obnoxious to the objections I have sustained, a careful consideration of what remains has led me to the conclusion that the verdict should be set aside and a new trial ordered.

It is not denied that an effort was made on the part of the defendant to influence the sentiment of the people of Bath as to the difference between plaintiff and defendant connected with and growing out of the enlargement of the village boundaries so as to include Ayres therein, and to show those people that the action of the village towards him was not taken in spite. This cause of difference made its appearance with some prominence upon the trial as a reason for claiming before the jury that this action was brought by plaintiff in revenge for having been made a village tax-payer. It appears also, to my judgment that some of the persons engaged in forming or correcting the sentiments of Bath as to whether Hammondsport was actuated by spite in making Ayres a tax-payer, went beyond that point and included in their efforts the question whether this was a "spite action" on his part, and that the verdict of the jury may have been influenced by efforts of persons so acting for or on behalf of the defendant.

Verdict set aside, with ten dollars costs of motion : ten dollars costs of reference and referee's fees to be taxed by clerk of Steuben county upon notice.

PUTNAM, Appellant, *v.* VAN ALLEN, Respondent.

Supreme Court, Third Department, General Term, November, 1887.

§ 3015.

Justice's court—Judgment, when to be rendered and entered, and how.

Upon the finding of a verdict by a jury upon the trial of an action in a justice's court, the justice must forthwith render judgment and enter it in his docket-book. The rendering of a judgment is a judicial act, and its entry a ministerial act; and if the judicial act is performed the failure to perform the ministerial act will not render the judgment void. The judicial act in such a case consists at least in fixing upon the amonnt of costs,—that is, determining what costs will be allowed and the amount thereof,—and this act should be indicated by some official action; a mere mental conclusion is not sufficient; nor is it sufficient merely to form the mental conclusion and express it verbally to the person entitled to judgment.

Where on the day that a verdict was rendered in a justice's court; the justice wrote down in his minutes of the testimony items of costs aggregating $7.82; and thereafter, upon the suggestion of the attorney for the defendant who was successful, fixed the costs at the sum of $5, and 75 cents witness fees, and wrote down in his minutes the items amounting to $5, but failed to add the 75 cents witness fees, or to note the fact that that was the judgment, and did not do so until October 5,—*Held,* that no judgment was rendered until October 5; that such judgment so entered, not having been rendered immediately after the verdict but four days latter, was clearly void and should be reversed; that no judgment was entered or rendered on October 1, and therefore the result of an appeal therefrom would be the same, whether it was taken from a judgment of October 1, or from one of October 5.

Stephens *v.* Santee (49 *N. Y.* 36); Fish *v.* Emerson (44 *Id.* 376); Youmans *v.* Simmons (7 *Hun,* 467); Christopher *v.* Van Liew (57 *Barb.* 17); distinguished.

(*Decided November,* 1887.)

Appeal from judgment of the county court of Fulton county, affirming a judgment of a justice of the peace.

This action was brought before a justice of the peace in the county court of Fulton county to recover the sum of $25. The answer was a general denial. Issue was joined September 14, 1885, and the case adjourned to October 1, when it was tried before a jury, which rendered a verdict against the plaintiff without leaving their seats. Immediately after the rendition of the verdict, the justice entered in his minutes, the following words: "Judgment for costs against the plaintiff was rendered," and he also or previously entered upon the margin of the first page of his minutes of the testimony, sundry items of costs amount-to $7.82. Soon thereafter,—and, as the justice certifies, "certainly within half an hour after the jury rendered their verdict,"—the defendant and his attorney returned to the court and desired the justice to determine the costs for which the defendant was entitled to judgment, and the justice went over and determined upon each item of costs to which the defendant was entitled, and there announced his determination to the defendant and his attorney, as follows: "Subp. $ .25, adjournment, .25; fees for jury, 2.70; swearing three witnesses, .30; trial fee, .75; rec. judgment, .25; entering judgment, .25; execution, .25; filing eight papers, .40; defendants subp. three witnesses, .35; witnesses fees, .75. Total, $6.54." And upon his attention being called by the defendant's attorney to the fact that under the pleading the judgment for costs could not be more than $5 and witness fees, the justice rendered judgment against the plaintiff for $5, and witness fees, and orally declared his judgment then and there in the presence of the defendant and his attorney, but, deeming it necessary to select from the items taxed as aforesaid such items as together with the $ .75 witness fees would exactly amount to $5.75, he made no further entry in the minutes that night, and did not make any

further entry in the minutes until October 5, 1885, when he made the following entry:

Fees for jury, $2.70; swearing three witnesses, .30; trial fee, .75; subp. .25	$4.00
Rec. verdict .25; entering judgment, .25; excution, .25; filing papers, .25	1.00
Fees to witnesses, 3	.75
Judgment	$5.75

This entry he at first dated October 1, but the plaintiff's attorney then coming into court and demanding that the date be October 5, it was so made.

Thereafter, the plaintiff duly appealed from the judgment so rendered by the justice, to the county court of Fulton county, where it was affirmed, and this appeal thereafter duly taken.

Frank B. Towman, for plaintiff-appellant.

"A justice of the peace has such jurisdiction in civil actions and special proceedings as is specially conferred upon him by statute, and no other." *Code Civ. Pro.* § 2861. "Where a verdict is rendered, the justice must forthwith render judgment," etc. *Code Civ. Pro.* § 3015. An appeal will lie from a void judgment to reverse it. Striker *v.* Mott, 6 *Wend.* 465.

Rendering judgment by a justice of the peace is a judicial act and the statute must be followed. It consists in taxing the costs to which the prevailing party is entitled, and adding them to the amount of the verdict,—*i. e.*, "he must declare it by an official act, such as indorsing an entry or minute of his decision upon the process returned before him,"—make it unchangeable and a matter of record. 3 *Wait's Law & Prac.* (5th ed.) 832, 833; Seaman *v.* Ward, 1 *Hilt.* 52; Stephens *v.* Santee, 49 *N. Y.* 35, 39. . . . "To render a valid judgment, it must be

made a matter of record publicly known." Dalton *v.* Loughlin, 4 *Abb. N. C.* 187, 191. The items mentioned as having been "then or previous thereto entered upon the margin of the first page," etc., do not make a judgment. They are not taxed as costs. Nellis *v.* Turner, 4 *Den.* 553, 554. "It is not enough that the verdict is immediately on its rendition entered in the docket and the items of cost are not entered or footed up until several days afterwards." *Cowen's Treatise* (6th ed.) § 1625; Sibley *v.* Howard, 3 *Den.* 72, 73; Watson *v.* Davis, 19 *Wend.* 371; Wiseman *v.* Panama Railroad Co., 1 *Hilt.* 300, 301. This case differs from Fish *v.* Emerson (44 *N. Y.* 376), Allen *v.* Godfrey (44 *Id.* 433), and Stephens *v.* Santee (49 Id. 35). In the case at bar, the items composing the judgment were not all, if any taxed and footed up, and in no place did the amount thereof appear until October 5, 1885—four days after the rendition of the verdict. In Fish *v.* Emerson, the justice made a complete record of the items composing the judgment, and "indorsed his judgment on the back of his minutes of trial," etc. (p. 377); and the court said (p. 379): "There is no doubt. . . . that the justice properly rendered his judgment by the written memorandum endorsed upon his minutes." In Allen *v.* Godfrey, the justice attempted to render judgment on Sunday, and afterwards, discovering that he had omitted an item of costs, rendered judgment for the full amount on the following Monday, and thereby, as it appears, accidentally rendered a valid judgment, as what he did on Sunday was void, as being holy time (pp. 434, 436). And in Stephens *v.* Santee, the justice immediately rendered a valid judgment, making a complete record of the items composing the same (p. 37), and the only thing claimed to have been omitted were the words "judgment for the plaintiff" (p. 38, fifth line from bottom of page, and more fully discussed on p. 49), and the court held that this entry—judgment for the plaintiff—was merely ministerial and might be regarded as made. Yet these cases

recognize the rule that rendering a judgment is a judicial act and must be evidenced by an official act,—such as an indorsement of a memorandum of it upon some process returned in the case or upon his minutes of trial. . . .

The appellant appealed to the Fulton county court "from a judgment rendered against him in favor of defendant (respondent) in this action. . . . . on the fifth day of October, 1885, for costs, $5.75," etc., and no other. That the jury rendered their verdict herein on the 1st day of October, 1885, there can be no doubt. And to hold that the justice could render a valid judgment thereon four days later, as the county court has held, is to ignore and disregard the statute and well established precedent. *Code Civ. Pro.* § 3015; Sibley *v.* Howard, 3 *Den.* 72, 73; Watson *v.* Davis, 19 *Wend.* 371. The county court should have either reversed the judgment of the justice's court, with costs, or dismissed the appeal upon respondent's motion, with $10 costs at most.

Andrew J. Nellis, for defendant-respondent.

The verdict for defendant is a bar to further prosecution by the plaintiff for the same cause; and the only discretion that the justice has is to fix costs. He must, of course, render judgment for the defendant. Felter *v.* Mulliner, 2 *Johns.* 181; Hall *v.* Tuttle, 6 *Hill*, 38; Stephens *v.* Santee, 49 *N. Y.* 35, 39. The justice, upon receiving the verdict, at once taxed the costs, item by item, and found the witnesses' fees to be 75 cents, and the aggregate of the items to be $6.54, and so formally declared. He also then and there declared in public, to defendant and his attorney, that he rendered a judgment against the plaintiff for $5.75. Here was the formal announcement which is a judicial act. Youmans *v.* Simmons, 7 *Hun*, 466, 469. As the plaintiff did not demand judgment for $50 or more, the statute itself declares the amount of judgment to be rendered. *Code Civ. Pro.* § 3076, subd. 2. Nothing appearing to the con-

trary, it must be intended that the 75 cents, witnesses' fees, were for witnesses attending from another county. Oakley *v.* Van Horn, 21 *Wend.* 305; Fuller *v.* Wilcox, 19 *Id.* 351. It was no part of the justice's duty, judicial or ministerial, to select from the items of costs taxed such as would aggregate $5 and add them to the 75 cents, witnesses' fees, and so enter his judgment. By the uniform practice of the courts, a justice's judgment is, on appeal, to be sustained by every reasonable and warrantable intendment. Schoonmaker *v.* Spencer, 54 *N. Y.* 366; Rickey *v.* Christie, 40 *Hun*, 278; Hayes *v.* Maytham, 20 *Weekly Dig.* 337. This court will not look beyond the returns and into the affidavits on which the order for amended returns were made in deciding this appeal. Trust *v.* Delaplaine, 3 *E. D. Smith*, 219; Beeby *v.* Roberts, 3 *Id.* 194; Kilpatrick *v.* Carr, 3 *Abb. Pr.* 117. In so far as the returns are silent, it will be presumed that the judgment was rendered on the very day the verdict was returned. Beattie *v.* Qua, 15 *Barb.* 132, 135. . . .

If in Christopher *v.* Van Liew (57 *Barb.* 17) the court could assume that there had been something more than a mental act, because the justice swore that he had formed his judgment, and then noted in his minutes differently than he had formed it, certainly a like assumption could be made here, if necessary.

Williams, J.—The section of the Code of Civil Procedure, 3015, requires the justice forthwith to render the judgment and enter it in his docket-book. Here are two acts. The one has been held to be a judical act, the rendering of the judgment; and the other a ministerial act, the entering the judgment in the docket-book (Fish *v.* Emerson, 44 *N. Y.* 376). If the judicial act is performed, the failure properly to perform the ministerial act will not render the judgment void (Same case). The real question here is, therefore, whether the judicial act was performed as required—whether the judgment was rendered. The

judicial act in such a case consists at least in fixing upon the amount of costs—in determining what costs the justice will allow, and the amount thereof. This act should be indicated by some official action. A mere mental conclusion will not be sufficient; nor, it seems to us, will it be sufficient to form the mental conclusion and express it verbally to the person entitled to the judgment. In this case, the justice concluded in his own mind as to the items making up the $5 of costs, verbally declared them to the defendant, and entered them upon his minutes; so far, there was judicial action. But as to the balance of the costs, though he returns he had concluded in his own mind as to the fees of three witnesses (seventy-five cents), and had verbally declared such conclusion to defendant, yet he stopped short of entering that item among the costs and footing up and arriving at the total, until four days later. Suppose nothing had been done after October 1, 1885, could it be said a judgment was rendered? We should still have the mental operation and the verbal declaration of the defendant; but no memorandum or entry of any kind evincing an intention that the total amount of the costs for which judgment had been rendered was $5.75 or any other definite amount. It does not seem to us it would do to say a judgment could be rendered by the forming of a mental conclusion, and the announcing verbally of such conclusion to the party entitled to the judgment.

In Stephens *v.* Santee (49 *N. Y.* 36), after a trial by jury and a verdict for plaintiff, the justice forthwith entered in his docket the amount of the verdict, and taxed and entered therein also the costs, and added the verdict and costs together, but failed to enter the words "judgment for plaintiff." It was held the judgment was good; that his judicial duty was to determine the amount of costs to which the prevailing party was entitled, and this had been done; the remainder of his duty was ministerial simply. Here, it will be seen, was the evidence upon the docket of

the performance of the judicial duty of fixing the amount of costs.

In Fish *v.* Emerson (44 *N. Y.* 376), the justice indorsed upon his minutes a memorandun, entitled in the cause, judgment for plaintiff for a sum specified, stating the damages and costs separately, but failed to enter the same in his docket-book. It was held a good judgment, the entry in docket being a merely ministerial act. Here was clearly the evidence of the taxing and fixing of the amount of costs, and damages in the official act of entering the same in his minutes. The counsel for respondent cites, in support of the proposition that the verbal announcement by the justice was a sufficient rendering of the judgment, without any official act of entering it anywhere, the case of Youmans *v.* Simmons (7 *Hun*, 467), which was a case decided in this department, Justice LEARNED writing the opinion.

But what was held there was that no judicial determination was made by the assessors until that which consisted in making and signing the roll; that a mere mental determination, evinced by no outward act, was not a judicial determination; that it was the formal announcement which constituted the judicial act, and that announcement was not a verbal one, but was the making and signing the assessment-roll. This case certainly can be regarded as no authority for respondent's contention here.

Christopher *v.* Van Liew (57 *Barb.* 17), is also cited by defendant's counsel. The justice there testified that, from the evidence before him, he found his judgment against the defendant and in favor of plaintiff, but, upon entering the judgment in his docket, he, by mistake, entered the judgment in favor of defendant against plaintiff. It was held the entering of the judgment in the docket was merely a ministerial and not a judicial act, and the mistake was, therefore, ministerial and not judicial. It was said by the court that a decision in the mind of the justice, without being evinced by any official act, was not a rendering of judg-

ment; that before a judgment can be said to be rendered there must be some official act other than a mere operation of the mind, as held in Stephens *v.* Santee (51 *Barb.* 532), which is the same case afterwards reported 49 *N. Y.*, above.

It did not appear how the justice had rendered the judgment, but he having sworn he had done so before entering it in his docket, the court assumed that by some official act he had done so before he started to enter it in his docket.

We think it must be said no judgment was rendered until October 5, 1885. The justice commenced to make entries which, if completed October 1, 1885, would have been such official act as would have amounted to the rendering of a judgment, but the entries were not completed so as to arrive at the full, complete amount of costs until October 5, 1885. This judgment, or pretended judgment, was appealed from; no judgment rendered or entered Ootober 1, 1885, was appealed from.

This judgment appealed from was clearly void as having been rendered, not forthwith after the verdict, but four days later, at a time when the justice had no right to render any judgment. That judgment should have been reversed by the county court because it was so void. Nevertheless, the county court affirmed that judgment, with costs. Very likely the affirmance was intended to be of a judgment rendered and entered October 1, 1885, but the fact is no such judgment was appealed from. We are of opinion, however, no judgment was rendered or entered October 1, 1885, so that the result would be the same if the appeal were in form from a judgment of that date.

The judgment of the county court and the justice should both be reversed, with costs in county court and on this appeal.

Learned and Landon, JJ., concurred.

SEYMOUR *v.* ASHENDEN.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, JANUARY, 1888.

§ 3251.

Costs.—When those paid as condition of amendment cannot be again taxed on finally succeeding in action.

Where a defendant was granted leave to amend his answer on payment of a part of the costs of the action to be taxed, and such costs were thereafter paid to the plaintiff, and the plaintiff succeeded in the action, the plaintiff cannot, on taxing his costs in the action, include the costs so paid.

Havemeyer *v.* Havemeyer (48 *N. Y. Super.* [16 *J. & S.*] 104); Donovan *v.* Board of Education (1 *N. Y. Civ. Pro.* 311, *note*), distinguished.

(*Decided January* 9, 1888.)

Motion by plaintiff for a new taxation of his costs.

Pending this action, the defendant asked leave to amend his answer, and Mr. Justice FREEDMAN, presiding at special term, granted the motion on payment of costs after notice of trial, and term fees, which were taxed at $45. Thereafter, plaintiff succeeded in the action, and sought to include among the costs taxed by him those which had been paid by the defendant as a condition of said amendment. The clerk, upon objection being made by defendant, refused to tax the same, and the plaintiff thereupon made this motion.

Blandy & Hatch, for plaintiff and motion.

Alexander & Green, for defendant opposed.

FREEDMAN, J.—Havemeyer *v.* Havemeyer (48 *N. Y. Super.* [16 *J. & S.*] 104), and Donovan *v.* Board of Education (1 *N. Y. Civ. Pro.* 311 *note*), do not apply. In

each of these cases, the party who had paid the costs as a condition for leave to amend, finally succeeded. In the case at bar, the costs were received by the party who finally succeeded. Moreover, on granting leave to the defendant to amend, on payment of a part of the costs to be taxed, I did not intend that in case they were received by the plaintiff and the plaintiff should be successful in the action, he should have the right to tax them over again.

Taxation affirmed.

SHERRY, Appellant, *v.* CARY, Respondent.

Superior Court of the City of New York, General Term, January, 1888.

§ 3228.

Costs.—What must be shown to entitle plaintiff in action to; upon recovering less than $50.—*Proof on taxation to authorize review.*

Where the plaintiff in an action on contract recovers less than $50, he must, to entitle himself to costs, show before the clerk, as taxing officer thereof, not only that the sum of the accounts of both parties, as set forth in the pleadings, exceeded $400, but also that the sum of the accounts actual proved on the trial exceeded that sum.

Upon a motion for a new taxation of costs to obtain relief, claimed as a matter of right, no affidavit can be considered, against the objection of the opposing party, which was not before the clerk. The determination of an appeal from an order made upon such motion must depend exclusively upon the state of the proofs before the clerk.

(*Decided January* 3, 1888.)

Appeal from two orders denying motions to retax costs, made for the purpose of reviewing the decision of the clerk of this court refusing to tax costs in plaintiff's favor.

Sufficient facts are stated in the opinion.

Edward P. Wilder, for plaintiff-appellant.

Nelson Smith, for defendant-respondent.

FREEDMAN, J.—This is an appeal from an order made at special term denying plaintiff's motion to vacate the judgment and to direct the clerk to tax plaintiff's costs and to enter judgment for such costs. In the notice of appeal the plaintiff gave notice that upon the appeal from said order he would ask for a review of a prior order denying plaintiff's motion for a new taxation of costs and affirming the clerk's decision refusing to tax plaintiff's costs. The jury having rendered a general verdict of $23.59 for the plaintiff, the clerk refused to tax plaintiff s costs because the verdict was for less than $50.

It is claimed by the plaintiff, however, that he is entitled to costs because the action is one of which no justice of the peace would have taken jurisdiction. Section 3228 of the Code of Civil Procedure, among other things, provides that the plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor in an action specified in subdivision 4 of section 2863. By turning to that section it is found that it refers to an action in which a justice of the peace has not juristiction. The action thus referred to is one where, in a matter of account, the sum total of the accounts of both parties proved to the satisfaction of a justice of the peace exceeds $400.

By the pleadings it appears that the complaint sued upon contains seven distinct causes of action, amounting in the aggregate to $552.50 exclusive of interest. The defendant interposed a general denial and then set up two counter-claims arising out of matters disconnected with any of the claims of the plaintiff, and amounting together to the sum of $561.26 exclusive of interest. To recover costs upon a verdict of only $23.89 in his favor as a result of a trial of all these issues, the plaintiff was, therefore, bound to show before the clerk as taxing officer not only that the sum of the account of both parties as set forth exceeded $400, but also that the sum of the accounts actu-

ally proved upon the trial was in excess of $400 (Tompkins *v.* Greene, 82 *N. Y.* 619; affirming 21 *Hun*, 257). The motions were made subsequent to the taxation and resulted in the orders appealed from, were made to obtain relief claimed by the plaintiff as a matter of right. No affidavit could, therefore, be considered against the objection of the defendant which was not before the clerk.

As a further consequence, the determination of the appeal now before us depends exclusively upon the state of the proofs before the clerk. From the appeal-book it is impossible to determine what proof was given by the plaintiff before the clerk. Even the bill of costs claimed and presented has not been printed. For all that appears, no proof was made before the clerk that the sum of the amounts actually proved to the satisfaction of the jury was in excess of $400. This being so, it is impossible to find that an error was committed either by the clerk or by either of the learned judges who respectively made the orders appealed from. The orders must be affirmed, with $10 costs and disbursements.*

KNAPP *v.* HAMMERSLEY, Impleaded, etc.

Supreme Court, First Department, New York County, Special Term, November, 1887.

§ 3253.

Costs—When extra allowance refused because no basis upon which it can be computed.

Where, in an action by a trustee to be permitted to resign and to be relieved from his trust, the defendant sets up the non-payment of certain taxes on property which was the subject of the trust, and tax sales thereof, and prayed that the trustee be required to pay

* An appeal to the court of appeals from this determination is pending.

such taxes and redeem the property before being relieved from his trust, and it appeared that pending the action the plaintiff paid the taxes,—*Held,* that an extra allowance should not be granted the defendant as a condition upon which the plaintiff should thereafter be allowed to discontinue; that the taxes having been paid, they had not been recovered by the defendant, and were not the subject of the action, and, therefore, there was no basis on which to compute an extra allowance.

(*Decided November* 14, 1887.)

Motion by plaintiff for leave to discontinue the action upon payment of taxable costs.

This action was brought by the plaintiff as a trustee substituted in the place of former trustees, deceased, to be relieved from his trust and for an accounting in respect thereto. The action was begun in May, 1887, and before the end of June, all the defendants had either appeared and pleaded, or were in default. The defendant, Andrew S. Hammersley, Jr., beside putting in issue some of the allegations of the complaint by a denial of any knowledge or information sufficient to form a belief as to their truth, set up as a defense the non-payment by the plaintiff of certain taxes on real property which was the subject of the trust, and which, by the terms of the will creating the trust, the trustee was required to pay, and also set up the sale of the land for such taxes and demanded that before the plaintiff was relieved from the trust he be required to redeem said land from such sales and to pay said taxes. Pending the action, the plaintiff paid said taxes and redeemed the said land from said sales.

In September, the defendant, Southwick, noticed the cause for trial at the October special term, and the defendant, Hammersley, noticed it for trial at circuit. Before the case was reached at special term, the plaintiff moved in open court before the justice holding that term for leave to discontinue the action upon the payment of costs to the defendants, Hammersley and Southwick, and the first named defendant asked that he be granted an extra allowance under Code of Civil Procedure, section 3253, and that

the payment of such allowance in addition to the taxable costs be made a condition upon which such discontinuance should be granted. He sought to have such allowance based upon the taxes set out in his answer as unpaid, and which, pending the action, the plaintiff had paid.

Stewart & Sheldon, for plaintiff and motion.

S. Jones, for defendant Andrew S. Hammersley, Jr., opposed.

Lawrence, J.—I do not see how an extra allowance can be granted to the defendant as a condition upon allowing the plaintiff to discontinue. The taxes which have been paid by the plaintiff since the action was commenced have not been recovered by the defendant, nor are they the subject of the action (Weaver *v.* Ely, 83 *N. Y.* 89; Ogdensburgh, etc. R. R. Co. *v.* Vermont, etc., R. R. Co., 63 *N. Y.* 176). There is, therefore, no basis on which a computation for an allowance could properly be made (Meyer *v.* Rasquin, 20 *Weekly Dig.* 98).

An order must, therefore, be entered permitting the plaintiff to discontinue upon payment of the taxable costs, including a trial fee, and the disbursements in the action.

HOLMES *v.* JONES, as Treasurer, etc.

Supreme Court, Third Department, Saratoga County, Special Term, January, 1888.

§ 531.

Bill of particulars—When not ordered in action for libel of matter pleaded in mitigation of damages.

Where the defendant in an action for libel sets up matter in justification and also in mitigation of damages,—especially where the matter pleaded in mitigation is of facts with which the plaintiff is entirely

familiar, and with which the defendant is not familiar,—there does not seem to be any reason for requiring the defendant to give a bill of particulars of such mitigating circumstances.

Where, in an action for libel consisting of statements that the plaintiff, who was an undertaker, at a particular funeral was in an unfit condition to perform the duties required, in consequence of his being intoxicated, the answer set up in mitigation of damages that the plaintiff was addicted to the drinking of intoxicating liquors to to excess, and had, prior to the date named in the alleged libel, been under the influence of liquor while attending funerals, etc., in the village of Saratoga Springs, which facts were known to many residents of said place, and it appeared from affidavits that the plaintiff had conducted the business of undertaker for more than forty years at said place, and had taken charge of more than one thousand funerals, and that he had a complete record of all the funerals he had attended,—*Held*, that the defendant should not be required to furnish a bill of particulars of the times and places when the plaintiff was intoxicated while so attending funerals; that the matters alleged did not constitute a defense, but were pleaded in mitigation of damages only; and, therefore, the application for a bill of particulars should be denied; but that the power of the court to order a bill of particulars in such a case was undoubted.

Orvis *v.* Dana (1 *Abb. N. C.*, 268), followed; Cardwell *v.* Cardwell (12 *Hun*, 92); Stiebeling *v.* Lockhaus (21 *Hun*, 257); Gardinier *v.* Knox (27 *Id.* 500), distinguished.

Where the affidavit upon which a plaintiff moved for a bill of particulars of matters alleged in an action for libel in mitigation, stated that he had no information or knowledge as to the particulars of the matters referred to, but did not state that he had no suspicion or belief in regard thereto, it is insufficient.

(*Decided January*, 1888.)

Motion by plaintiff for a bill of particulars of matters set forth in answer of the defendant.

The facts appear in the opinion.

C. S. Lester, for plaintiff and motion.

H. E. Young (*Townsend, Dyett & Einstein*), for defendants, opposed.

Fish, J.—I cannot see any good reason for granting this motion, The action is brought to recover damages for the publication of a libel in the *New York Times*, a public newspaper, published by an association of which the defendant is treasurer. The offensive language made use of in the alleged libel consists of a charge that plaintiff, at and about the time he claimed to be doing service as an undertaker in charge of the remains of General Grant at Mt. McGregor, was in an unfit condition to perform the duties required, in consequence of his being in a state of intoxication from the use of spirituous liquors.

The answer does not deny the publication of the article as charged, but rather pleads justification, to the effect that the statements of the alleged libel in regard to plaintiff's condition and behavior at the time stated were true, and were published without malice, only as a part of the current news; and then, as a further answer in mitigation of damages, pleads that the plaintiff was a person who had been for a long time immediately prior to, was at the time when, &c., and has been since, addicted to the drinking of intoxicating liquors to excess, and had, on various occasions prior to that date, been under the influence of liquor while attending funerals, &c., at the village of Saratoga Springs, which facts were known to many residents of Saratoga.

The plaintiff asks for a bill of particulars stating the names of persons at whose funeral the plaintiff was under the influence of liquor, and when and where such funerals took place, on an affidavit of plaintiff that he has no information or knowledge as to the time and place where a funeral took place in which deponent was under the influence of liquor, so that he cannot prepare for trial for want of information of the name of any person whose funeral was so conducted.

The facts averred do not constitute a defense to the action, and do not constitute any claim against plaintiff; but if proved on the trial, it is claimed, they may be con-

sidered by the jury on the question of damages, even though a complete defense may not be established.

The plaintiff in his complaint states in substance that for many years he has resided at Saratoga Springs, during which time he has practiced the business of undertaker. In his affidavit on this motion, he states that he has conducted such business for forty years at that village, and has taken charge of more than one thousand funerals. If the information the plaintiff desires to enable him to prepare for trial, related to facts and matters of which the defendant had better knowledge than plaintiff, and with which defendant was more familiar than plaintiff, there would be considerable merit in plaintiff's application for this bill of particulars. Such, however, is not the case. The plaintiff, on the contrary, probably has a record of all the funerals he has attended at Saratoga Springs, and cannot well be taken by surprise at a trial had in that county upon proof relating to any of them.

It might be a difficult thing for the defendant, who must act entirely upon information and belief, to give names and particulars of the cases where plaintiff has officiated in that capacity. Again, the matters of which plaintiff seeks particulars, are such as might be proved by a defendant upon assessment of damages on default for want of answer (see section 536 of the Code of Civil Procedure). In that case, the plaintiff would not be entitled to any notice whatever that the defendant intended to offer proof of facts in mitigation.

Where the defendant has in his answer, along with a plea of justification, given plaintiff notice that he will offer proof of certain facts in mitigation, and especially facts of which plaintiff is entirely familiar, and of which defendant is not familiar, there does not seem to be any good reason for requiring defendant to give a bill of particulars of the mitigating circumstances.

The affidavit upon which plaintiff moves does not state he has that no suspicion or belief as to what particular

cases the defendant refers, but states only that he has no information or knowledge on the subject. Such an affidavit might well be made, even where the affiant was fully persuaded in his mind what occasions were alluded to.

It does not follow as a matter of course that a party is entitled to a bill of particulars in this class of cases. The statute has given the court power to require increased particularity in any and all cases where special grounds are shown to exist (See Dwight *v.* Germania Insurance Co., 84 *N. Y.* 493).

I find no case where a bill was ordered requiring particulars as to matters offered in mitigation. I find no case where an order was made upon as imperfect an affidavit as the plaintiff offers here.

Orvis *v.* Dana (1 *Abb. N. C.* 268) comes nearer than any other to the one before us, and upon the authority of that case this motion must fail. The cases of Cardwell *v.* Cardwell (12 *Hun*, 92); Stiebeling *v.* Lockhaus (21 *Hun*, 457); Gardinier *v.* Knox (27 *Hun*, 500), are neither of them in point to justify the order asked for here.

The power of the court is not doubted. It should, however, only be exercised where there is reason to believe that justice will be promoted by requiring a party to disclose his hand more fully with particulars.

There is no ground for such action in this case.

Motion denied.

HATFIELD *v.* TODD.

SUPREME COURT, FIRST DEPARTMENT; NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1887.

§§ 493, 514.

Reply—Cannot contain counter-claims—Remedy.

A reply to an answer cannot contain counter-claims.

Cohn *v.* Husson (66 *How. Pr.* 150), followed.

Where a reply improperly contains counter-claims the remedy is by motion to strike them out, and not by demurrer. Demurrer is only authorized against new matter not pleaded as a counter-claim.

(*Decided November* 16, 1887.)

Motion by defendant to strike out three paragraphs of the answer setting up counter-claims.

This action was brought to recover $11,250 and interest, balance due upon an account alleged to have been stated between the plaintiff and the defendant, by which it was found that the defendant was indebted to the plaintiff in the sum of $13,500. The answer of the defendant denied each and every allegation of the complaint and set up a counter-claim of $2,628.66 for board, rooms, attendance, etc., furnished by the plaintiff as proprietor of the Hotel Vendome to the plaintiff, at his request. To this counter-claim the plaintiff served a reply, which, beside setting up matters in denial and avoidance of the same, and also alleging payment, pleaded four counter-claims, viz.: First, for services alleged to have been rendered by the plaintiff as an architect, to the defendant, of the value and reasonably worth the sum of $20,715, of which it is stated that there remains due and unpaid the sum of $16,115. Second, for other services as an architect alleged to have been rendered by the plaintiff for and at the request of the defendant, the sum of $20,500. Third, for

moneys loaned, and for other work, labor and services performed, the sum of $9,500; and fourth, on an account stated at $16,615, balance of $16,115 and interest. This reply concluded with the following demand for judgment: "Wherefore plaintiff demands judgment against the defendant as demanded in the complaint, and for the sum of $16,115, with interest thereon from the 23d of August, 1886, and for the sum of $20,500, and interest thereon from the 28th of January, 1886, and for the sum of $9,500, and interest thereon from the 28th of January, 1887, and for the sum of $16,115, with interest thereon from the 23d of August, 1887, beside the costs and disbursements of this action."

Arnold & Green, for defendant and motion.

Cited: *Code Civ. Pro.* § 514; Cohn *v.* Husson, 66 *How. Pr.* 150.

Cornelius Fiske, for plaintiff, opposed.

Cited: Houghton *v.* Townsend, 8 *How. Pr.* 441; Stewart *v.* Travis, 10 *Id.* 148; Allen *v.* Paterson, 7 *N. Y.* 476; Devlin *v.* Bevins, 22 *How. Pr.* 290; Kain *v.* Dickel, 46 *Id.* 208; Hall *v.* Hall, 30 *Id.* 51.

Barrett, J.—The motion to strike out the counter-claims from the reply as unauthorized should be granted, with costs. One of the cases cited distinctly approves of such a specific counter-claim whatever may be said of set-offs. I agree with Judge McAdam's opinion in Cohn *v.* Husson (66 *How. Pr.* 150). I also agree that the remedy is by motion.

Demurrer is authorized only against new matter not pleaded as a counter-claim.

Estate of MARGARETTA GROVE, Deceased.

Surrogate's Court, New York County, January, 1888.

§ § 810 et seq., 2667.

Bond—Husband may act as surety for wife on her bond as administratrix.

A husband may act as surety upon a bond given by his wife for the faithful performance of her duties as an administratrix; and, *it seems* that a wife who has a separate estate may be a surety upon the bond of a husband for the faithful performance of his duties as an administrator. [11, 15]

Estate of McMaster (12 *N. Y. Civ. Pro.* 177), disapproved and not followed; [1, 15] Bertles *v.* Nunan (92 *N. Y.* 152); [2] Zorntlein *v.* Bram (100 *Id.*12); [3] Fairlee *v.* Bloomingdale (14 *Abb. N.C.* 341), [4] distinguished; Yale *v.* Dederer (18 *N. Y.* 265); [7] Corn Exchange Ins. Co. *v.* Babcock (42 *Id.* 613); [8] Third Nat. Bank *v.* Blake (73 *Id.* 260), [9] applied and followed.

At common law, the contracts of a married woman were void, and could not be enforced against her; but in equity a married woman having a separate estate has been treated, as to such estate, as a *feme sole,* and capable of charging such estate in equity with all her debts and obligations. [5.]

It seems, that prior to the enactment of Laws of 1884, chapter 381, a married woman could become a surety for her husband on his promissory note or other obligation if she expressly charged her separate estate, [6, 10] and that, since the enactment of said law, she may become liable on such a contract without even charging her separate estate; [12] that she may form a copartnership with her husband and give notes in the firm name, where the debt was created for property furnished for the benefit of her separate estate; [13] and that she may contract with her husband in relation to her separate estate. [14]

(*Decided January,* 1888.)

Application to require the administration clerk of the surrogate court of New York county, to accept the husband of the administratrix herein as a surety upon the

bond given by her for the faithful performance of her duties.

The opinion states sufficient facts.

Howard R. Bayne (*Maltbie, Bayne & Marshall*, attorneys), for administratrix and motion.

The only case reported where a husband has been refused as a surety for his wife is Estate of McMaster, 12 *N. Y. Civ. Pro.* 177. . . But we respectfully submit that case was improvidently decided and without due consideration. The cases npon which it was decided were not authorities for the decision, and should not have controlled. The citation from 1 *Blacks. Comm.* 442, merely refers to the well established principle at common law of the disabilities arising from coverture. It is not an express authority for the position in question. The New York cases cited to support the doctrine that a husband cannot be surety for his wife are not in point, and do not support that doctrine. Since *Laws* 1867, c. 782, married women have the same right to administer as if single. Matter of Curser, 25 *Hun*, 579; West *v.* Mapes, 4 *Redf.* 496. Any contract, therefore, made with her as administratrix is a contract made in *autre droit*, and in such right a wife could contract even with her husband at common law. *Co. Litt.* 112 a. But we contend a husband being surety for his wife is not contracting with her in the sense in which even the spirit of the common law forbade contracts between husband and wife. There is no contract in this case between the husband and wife.

But the law of 1867 as construed in 25 *Hun*, 579, and 4 *Redf.* 496 (*supra*), *makes a married* woman *single* for all purposes of administration throughout. No disability of coverture can possibly affect her rights or liabilities under such appointment. For if so, then the rights and liabilities of the officers of the law depend not upon their office, but *upon whether they are married or not.* It is her right

to have accepted a good and sufficient surety for the performance of her trust, and if her husband is refused as such merely because he is her husband, then at once the disabilities of coverture are set up against her in the face of the statute passed for the very purpose of removing any such possible objection. It has been expressly held by the court of appeals in this State that a wife can be surety for her husband, and such liability on her part has been repeatedly enforced (see Corn Ex. Ins. Co. *v.* Babcock, 42 *N. Y.* 613; Carpenter *v.* O'Dougherty, 58 *Id.* 681; Third Nat. Bank *v.* Blake, 73 *Id.* 260; Woolsey *v.* Brown, 74 *Id.* 82.

Prior to the act of 1884, c. 381, it was necessary that a married woman should expressly charge her separate estate to make the contract of suretyship enforceable against her. This was held in the cases last cited, and the question came up for special consideration and decision in Linderman *v.* Farquharson, 101 *N. Y.* 434, where the court refused to enforce the liability of the wife on the ground that she had not been requested by the husband to become his surety, and the contract of suretyship had not existed, and her promise was accordingly entirely without consideration. See page 438.

By the act of 1884 (*Laws of* 1884, c. 331) it is no longer necessary for the wife, to bind herself, to expressly charge her separate estate. The sweeping changes wrought by this act are apparent at a glance. The effect of them was expressly noticed and acknowledged in the opinion of the court in Linderman *v.* Farquharson, *supra.* It is expressly enacted thereby that "a married woman may contract to the same extent, with like effect and in the same form as if unmarried."

The only restrictions to a wife's becoming a surety for her husband recognized by the court in Third National Bank *v.* Blake, 73 *N. Y.* 260, and similar cases, being thus by the legislative will completely abolished and swept away, no possible reason exists in law for declining a

married woman as a surety for her husband solely because she is married. No reason except for the vague and dim shadow of a ghost of authority in 12 *N. Y. Civ. Pro.* 177, in which case no allusion was made to the act of 1884 and none to the well known and well established principles which that case tended to overthrow.

If now, a wife can be a surety for her husband, as we have clearly shown.—a wife who alone is disabled by coverture,—*a fortiori* a husband, upon whom no disability was ever cast, even at common law, can be surety for his wife.

Ransom, Surr.—The administratrix, after taking the oath of office and signing the required bond in the penalty of $6,000, produced, as one of her proposed sureties, her husband.

The administration clerk refused to accept him as a surety, the custom having been latterly to conform the practice, in this particular, to the decision by Lawrence, J., in Estate of McMaster (12 *N. Y. Civ. Pro.* 177).

[1] Up to the present time this decision has never been questioned; no objection has ever been made to the rejection of a husband or wife as the surety on the bond of each other.

The facts in the McMaster case were as follows: Mary G. Muir, as executrix of David McMaster, gave three undertakings, upon each of which her husband, David Muir, was a surety. The respondent, Johanna Bernhard, excepted to his sufficiency as a surety, on the ground that he had not the legal capacity to be the surety of his wife.

Judge Lawrence, in his opinion, says: "The cases cited by Mr. Foster, respondent's attorney, seem to sustain the exceptions taken by him to the sufficiency of Mr. Muir as surety for his wife."

The above is all there is of the opinion: no cases are cited, and the justice relies entirely on the cases cited by respondent's attorney for reaching the above decision.

[*] The first case presented by counsel in that case was Bertles *v.* Nunan (92 *N. Y.* 152), which bears simply and solely on the point of what estate husband and wife are seized of where there is a joint conveyance of land to them, and decides that they do not take as tenants in common or joint tenants, but as tenants by the entirety; and for this purpose the common law doctrine of the unity of husband and wife has not been abrogated by statute, and recognizes the fact that under the statutes of 1860 and '62 the wife is enabled to control and convey whatever estate she gets by any conveyance made to her solely.

[*] The next case cited was Zorntlein *v.* Bram (100 *N. Y.* 12). This case was decided precisely on the same point as the one in 92 *N. Y.*, and the same remarks and criticisms will apply.

[*] The next case which was considered by Judge Lawrence was Fairlee *v.* Bloomingdale (14 *Abb. N. C.* 341). This was on the point of the validity of a partnership existing between husband and wife, and the court held that prior to 1884 such a partnership could not exist, because in a partnership there can be no "separate property" and "business," and the "labor" performed by one partner in connection therewith cannot possibly be on the "sole and separate" account of the party performing it. This case is negative rather than affirmative authority that where the wife has a separate estate she is absolute mistress of it as though she were a *feme sole*, but that, because the very nature of a partnership requires a joint ownership of the partnership property, she is thus placed in the position of any partner in respect to the joint ownership of the partnership property; and then the common-law rule applies that because of the unity of husband and wife there can be no partnership between them. The other cases cited are on this last point.

It will beseen that Judge LAWRENCE has evidently not examined the Laws of 1884, chapter 381. All the cases cited above were considered before that act, as indeed wer the cases that will be considered later on; but that act weakens and lessens whatever effect the above mentioned cases may have on the point, while it strengthens those cited in support of my theory.

[*] There is no doubt but what at common law the contracts of a married woman are void, and cannot be enforced against her; but in equity, a married woman having a separate estate has been treated, as to such estate, as a *feme sole*, and capable of charging such estate in equity with all her debts and obligations. This is so universally conceded and settled that authorities are unnecessary. Now that we have her right to make a contract charging her separate estate, we will go a step further. Can she [*] make a contract whereby she agrees to become surety for her husband on his promissory note or other obligation if she expressly charges her separate estate? The entire weight of the authorities supports this proposition.

[*] The most notorious case on this point seems to be that of Yale *v.* Dederer (18 *N. Y.* 265). In that case, Dederer had bought 38 cows of plaintiff, and refused to complete the sale unless his wife would write him a note for the price. An action was brought upon it against Dederer, judgment recovered, and execution issued and returned unsatisfied, and an action then brought against the wife. She was proved to have a separate property amply sufficient for the payment of the note. Judgment against her was awarded at special term, affirmed at general term and reversed by court of appeals. In the opinion, COMSTOCK, J., says: "My conclusion, therefore, is that, although the legal disability to contract remains as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purpose and to the extent which the rule in equity has heretofore sanctioned

in reference to separate estates." The judgment was reversed upon the ground that the mere signing of a note by a married woman—not, in fact, for the benefit of her separate estate, but as surety for another, and not declared in the note to be for her benefit, and where she had not professed in her contract to charge such estate—did not operate as a charge upon the estate. A much stronger [8] case is that of Corn Ex. Ins. Co. *v.* Babcock (42 *N. Y.* 613), where it was held that where a married woman having separate real estate, indorses her husband's promissory note as his surety without consideration and without benefit to her separate estate, but which indorsement expresses that, for value received, she thereby "charged her individual property with the payment of this note, that an action on such indorsement, in which is alleged the coverture of the defendant, the ownership by her of separate estate, her intent to charge such estate with the note, and her indorsement in the form stated, is maintainable." This case was followed in Carpenter *v.* O'Dougherty, 58 *N. Y.* 681.

[9] In Third Nat. Bank *v.* Blake (73 *N. Y.* 260), the defendant, Elizabeth M. Blake, indorsed the promissory note of her husband to the plaintiff thus: "I hereby charge my separate and personal estate for the payment of the within note"; *held*, that this was a valid agreement on her part, based on a sufficient consideration, and was binding; that the indorsement being in form a charge upon her separate estate, she could deal with the obligation as if she was a *feme sole.*

[10] These cases would seem to settle beyond any doubt that a married woman, having a separate estate, can become the surety of her husband on a promissory note. I have been unable to discover any decisions where the husband or wife have gone on each other's bond; but the two cases become so similar—the same principles of law governing both—I think the cases above referred to must govern in the latter as in the former case.

[11] It is true that the question under discussion is whether the husband can go on the wife's bond; but having established that, under similar circumstances, the wife could become surety for her husband, I have no hesitation in saying that the husband could for the wife, and, indeed, I think that would be the stronger case of the two.

All the cases discussed above were decided prior to 1884. In that year chapter 381, Laws 1884, was passed by the Legislature, and reads as follows:

"Section 1. A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate, or otherwise, and in no case shall a charge upon her separate estate be necessary.

"Section 2. This act shall not affect nor apply to any contract that shall be made between husband and wife."

[12] This enactment removes even the requirement that in a contract she may make either with third persons for her own benefit or the benefit of her husband, she need expressly charge her separate estate, and, as the counsel for the administratrix has argued in his brief, the contract is not with him, but about him, and made with a third party as obligee.

[13] A husband and wife may form a partnership and give notes in the firm name where the debt was created for property furnished for the benefit of her separate estate (Graff *v.* Kinney, 37 *Hun*, 405).

[14] Suppose we admit, for the sake of argument, that if a wife go on her husband's bond, or *vice versa* that it is a contract between them, and not one with a third person; even in that case it has been held that she may contract with her husband in relation to her separate estate (Bodine *v.* Killeen, 53 *N. Y.* 93; Knapp *v.* Smith, 27 *N. Y.* 277).

But there can be no question as to who would be the contracting parties in the case of a bond. A perusal of the bond will show that the obligor or obligors are held and firmly bound unto "the People of the State of New York." It is very plain that the contract is between the surety and the People.

[15] I think there can be no question but what the husband or wife can go on each other's bond; in the case of the wife, if she has a separate estate; and the decision of Judge LAWRENCE should be disregarded.

BONN, APPELLANT, *v.* BLOCH, RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM. DECEMBER, 1887.

§§ 549, 567, 568.

Arrest—When order of, vacated in action for breach of promise to marry, because of defendant's willingness to perform the same.

Under the Code of Civil Procedure, section 549, as amended in 1886, the plaintiff in an action in which the arrest of the defendant is sought, is bound to allege in his complaint and prove upon the trial the facts constituting the ground of arrest in every action, so that practically there is now no such thing as an arrest on facts outside of the cause of action; and to that extent the cause of arrest and the cause of action are always identical, and it is manifestly an error to say that an order of arrest cannot be discharged. Although it may be that where the affidavits on which the motions to discharge an order of arrest is made are merely conflicting, it would be the safer practice to deny the motion, where the facts on the behalf of the defendant are overwhelming, there is no reason why the court should not act at once and grant the discharge.

Where, in an action for a breach of promise to marry, the defendant sought his discharge from arrest upon affidavits admitting the promise but denying the breach and offering to marry the plaintiff, which

offer she rejected,—*Held,* that a motion to discharge the order of arrest was properly granted, and should not be reversed on appeal. (*Decided December* 21, 1887.)

Appeal by plaintiff from an order of the special term discharging the defendant from arrest and imprisonment herein, under an order of arrest.

This action was commenced June 4, 1887, to recover damages for a breach of promise to marry. On the same day, an order of arrest was granted, in which the bail was taxed at the sum of $1,000. The defendant was arrested under said order on June 6, 1887. On the same day, upon his own affidavit in which he stated: "I am the defendant herein, and was arrested; I promised to marry plaintiff, but she refused to marry me; I am now ready and willing to marry plaintiff; I am now in actual custody, and, therefore, pray that the foregoing order to show cause be granted; no previous application has been made," he obtained an order to show cause, returnable on the same day, why he should not be discharged from arrest. In answer to this affidavit, the plaintiff produced her own affidavit and that of her brother, stating that the defendant said that if the plaintiff sued him he would offer to marry her and then leave for parts unknown. After hearing counsel, the justice presiding at special term granted the motion, filing the following memorandum of his reasons for so doing.

Nehrbas, J.—Order of arrest vacated and prisoner discharged. The defendant being willing to marry plaintiff, who now refuses to enter into the marriage contract, the defendant should not be confined in jail.

The plaintiff thereafter took this appeal.

David Tim, for plaintiff, appellant.

After the defendant refused to fulfill his promise at the

appointed time, the contract was broken, and the plaintiff's right of action accrued.

When a party is guilty of a breach of contract, and by his own act and deeds, annuls the contract, the other contracting party is not required or compelled to fulfill his or her part of the contract, even though the violating party offers to comply with the terms of the contract. Rouse *v.* Lewis, 4 *Abb. Ct. App. Dec* 121; Neville *v.* Frost, 2 *E. D. Smith*, 62; Blewett *v.* Baker, 37 *N. Y. Super.* (5 *J. & S.* 23; De Pyster *v.* Pulver, 3 *Barb.* 284. "After one of the parties to an agreement has refused to execute the same on his part, and has declared his inability to do so, he cannot insist upon a performance there of by the other party." See Liefman *v.* Soloman, 7 *Abb. Pr.* 409 *note.* "An offer to renew the engagement of marriage is no defense to an action for the breach." Where the arrest and cause of action are identical, the court will not discharge the defendant from arrest. Warshauer *v.* Webb, 1 *N. Y. St. Rep.* 130; Welch *v.* Winterburn, 14 *Hun*, 518; Stuyvesant *v.* Bowran, 34 *How. Pr.* 51; Nelson *v.* Blanchfield, 54 *Barb.* 630; Peck *v.* Lombard, 22 *Hun*, 63.

P. Gratz, for defendant-respondent.

Hall, J—This action is brought to recover damges for a breach of promise of marriage. Defendant was arrested and held in bail; the motion was made to vacate the order of arrest on an affidavit by defendant admitting the promise of marriage; he alleged that plaintiff had refused to marry deponent, and also renewed his offer to marry plaintiff, which offer plaintiff again refused, whereupon the justice at special term discharged the order of arrest. Since the latest amendment of the Code of Civil Procedure, the plaintiff is bound to allege in his complaint and prove upon the trial the facts constituting the grounds of arrest in every action, so that it may be said that there is now no such thing as an arrest on facts outside of the

cause of action; and to that extent the cause of arrest and the cause of action are always identical, and it is manifestly an error to say that an order of arrest cannot be discharged in such a case; for that would be saying in effect, that a person should be arrested in a civil action and must be kept imprisoned, if unable to give bail, until he could have a trial.

It may be conceded that where the affidavits on the motion to discharge an order of arrest were merely conflicting it would be safe practice to deny the motion; but where the facts on behalf of the defendant are overwhelming, there is no reason why the court should not act at once and discharge the order.

In the case at bar, the plaintiff swore to the promise of marriage and its breach by defendant. The defendant admitted the promise, but denies any breach by him, and sets up a breach by plaintiff, and offers to marry her and carry out his promise, which she refused. Upon this state of facts, the justice at special term evidently concluded that the defendant's theory of the matter was correct and denied it, and we see no reason to disturb the decision.

Order must be affirmed, with costs to respondent.

CLARK, Respondent, v. LOCKARD, Appellant.

City Court of Brooklyn, General Term, December, 1887.

§§ 399, 435.

Limitation to action—Effect of substituted service within sixty days after issuing of summons to save claim from bar of statute—Construction of statute.

In considering any part of a statute the whole must be considered. The different parts reflect light on each other, and, if possible, such construction is to be made as will avoid inconsistency and subserve justice and right.

Where the summons in an action upon a claim was issued to the sheriff two days before the period limited by statute within which an action upon the cause of action set forth in the complaint could be brought, and the summons was thereafter within sixty days after it was so issued served by substituted service pursuant to an order duly made, —*Held*, that such service of the summons was sufficient to make the issuing thereof equivalent to the commencement of an action within the meaning of section 399 of the Code of Civil Procedure,—providing that the issuing of a summons to the sheriff within the time limited by law for the commencement of an action, followed, within sixty days after the expiration of the time limited, by personal service thereof or by the first publication of the summons was equivalent to the commencement of an action,—that substituted service and service by publication are now equivalent in their effect upon proceedings in an action.

Bogert *v.* Swezey (26 *Hun*, 463), followed. Ferry *v.* Plummer (unreported); Blossom *v.* Estes (84 *N. Y.* 615); Catlin *v.* Ricketts (91 *N. Y.* 668, affirming 27 *Hun*, 242), followed.

Under the Code of Procedure, substituted service in an action was equivalent to personal service thereof; but under the Code of Civil Procedure substituted service is not equivalent to personal service; but is equivalent, in its effect upon the proceedings in an action, to service by publication.

(*Decided, December* 30, 1887.)

Appeal by defendant from a judgment in favor of the plaintiff rendered in an action upon a promissory note.

The opinion states the facts.

Martin E. Halpin, for defendant-appellant.

In Bogert *v.* Swezey (26 *Hun*, 463) the court say: "The language of the section is very plain. It requires one of the two modes of service,—to wit, personal service or service by publication. It says nothing of substituted service. These three modes of service are equally well known to the Code. The express mention of two and the omission of all reference to the other, lead to the inference that the legislature intended to exclude the mode not named. Neither of these three is the precise equivalent of the other."

This case is identical with the above case, only substituting section 638 of the Code of Civil Procedure for section 399 of the Code of Civil Procedure. Section 399 says nothing about substituted service. It distinctly says, personal service or service by publication. Such section as to the modes of service is equally plain, as section 638 of the Code, and the court, in such case, held, that an attachment fell where the summons was not personally served or service of the same made by publication, within thirty days from the time when such attachment was obtained, although, within thirty days, defendants were served with summons in such action, by substituted service, under section 435 of the Code of Civil Procedure. Simpson *v.* Burch, 4 *Hun*, 315; on p. 317, GILBERT, J., says: "The omission to serve the summons personally or by publication, within thirty days afterward, was an irregularity, which entitled the defendant to avoid all proceedings after the issuing of the attachment."

In such case there was a service by substituted service, and the court held the same not sufficient, to wit, neither a personal service nor a service by publication.

In the following cases it is held, in regard to service of summons, there must be a strict compliance with the statute, and that substituted service of the summons is neither a personal service of the summons nor a service of the same by publication.

Gere *v.* Gundlach, 57 *Barb.* 13; Taylor *v.* Troncoso, 76 *N. Y.* 599; Mojarriette *v.* Saenz, 10 *Weekly Dig.* 61; Waffle *v.* Goble, 53 *Barb.* 517; on p. 523 of such case, it is said: "But it also provides that such attempt must be followed by the first publication of the summons or the service thereof within sixty days."

Taddiken *v.* Cantrell, 1 *Hun*, 710, 711, it is said: "The legislature imposed upon the plaintiff the duty of perfecting personal service or commencing publication within thirty days." Also, on p. 712: "The action is commenced when the summons is issued, and upon it the attachment

rests, provided however, that within thirty days from the day of granting the attachment, the defendant is personally served with the summons or its publication is commenced." Laws 1853, chap. 571, p. 974, passed June 30, 1853; Blossom *v.* Estes, 84 *N. Y.* 614; Kelly *v.* Countryman, 15 *Hun*, 97; Blossom *v.* Estes, 22 *Id.* 472; Mojarriette *v.* Saenz, 80 *N. Y.* 548; Schwinger *v.* Hickok, 46 *How. Pr.* 114; Webb *v.* Mott, 6 *Id.* 439; Dix *v.* Palmer, 5 *Id.* 233; Pomeroy *v.* Ricketts, 27 *Hun*, 242; Baxter *v.* Arnold, 9 *How. Pr.* 445; Catlin *v.* Ricketts, 91 *N. Y.* 668.

John Henry Hull, for plaintiff-respondent.

Such substituted service is, for all purposes of this action, equivalent to the forms of service called for by, and meets the requirements of section 399 of the Code Civ. Pro. "By sections 435 and 436 of the Code of Civ. Pro. provision is made for substituted service in the case therein mentioned, and section 437 declares the effect of such service." The effect of this provision is to make the service described in the order for substituted service equivalent to service by publication, and the result is that the defendant on whom such service is made is in default at the expiration of twenty days from the time of making the service. It is equivalent, therefore, to personal service." Orr *v.* McEwen, 16 *Hun*, 625, 627. This view is sustained by Bogert *v.* Swezey, 26 *Hun*, 463. "It is held in Orr *v.* McEwen, 16 *Hun*, 625, that substituted service is equivalent to personal service so far as it affects the right to enter judgment." Service, therefore, having been complete, substituted service having been adjudged equivalent to service by publication or personal service within the meaning of section 399 of the Code for all purposes of this action, defendant was in default within twenty days after date of such service—*i. e.*, on the 29th day of June, 1886, and judgment duly entered accordingly on September 18, 1886. The judgment has never been set aside or appealed from.

Van Wyck, J.—This is appeal from a judgment in favor of the plaintiff against the defendaut on a promis, sory note. Defendant insists that the cause of action is barred by the statute of limitations. Whether it is or not, is the only question submitted to our consideration. The note fell due May 20, 1880, and the six years' limit for begining an action on such cause of action expired May 20, 1886. Two days before this period expired,—to wit, on May 18,—the summons was duly issued to the sheriff for service. Within sixty days from May 20,—to wit, on June 9,—the summons was served by substituted service by virtue of an order made under section 435 of the Code of Civil Procedure. Code of Civil Procedure, section 399, provides that such issuing of the summons is equivalent to the commencement of the action within the meaning of the provision of the Code which limits the time for commencing action; provided such issuing of the summons shall be "followed within sixty days after the expiration of the time limited, . . . by personal service thereof, . . . or by the first publication of the summons." The summons in this case was duly issued, but was not followed by such personal service or publication thereof, though it was duly served by substituted service pursuant to section 435 of the Code within the said sixty days. The spirit of the statute, section 399, is that an honest effort to serve the summons through the sheriff before the statutory period of limitation has expired, if followed by service of summons within sixty days after such expiration, will save the cause of action from being barred. The law, if the letter of this section alone is considered, is that such result will not be attained, unless the summons be personally served or served by publication. Now, can the spirit and letter of this statute be so reconciled as to include substituted service as well as personal service and service by publication ?

In considering any part of a statute, the whole must be considered; the different parts reflect light on each

other, and if possible such construction is to be made as will avoid inconsistency and subserve justice and the right.

It does not seem that the question involved on this appeal, under section 399, has ever been considered in any reported case. But similar wording as to service of summons will be found in section 638 of the Code of Civil Procedure,—which provides that a warrant of attachment may be granted to accompany the summons, provided that within thirty days thereafter the summons shall be personally served, or publication thereof commenced.

The general term of the supreme court of the first department has decided that substituted service pursuant to section 435 will not sustain the warrant of attachment though made within thirty days after the warrant was granted, but that, to secure this end, section 638 must be strictly construed and the summons be either served personally or by publication (Bogart *v.* Swezey).

Like words as to service will be found in section 1670, of the Code of Civil Procedure,—which enacts that a *lis pendens* can be filed against real estate before service of a summons, provided, within sixty days after such filing, the summons shall be served either personally or by publication.

The general term of the supreme court for the second department has held that the language of the last above section must be construed liberally, and that the vitality of a *lis pendens* so filed and followed by substituted service of the summons, within sixty days thereafter, will be preserved though such service is not *eo nomine* mentioned in section 1670 (Ferry *v.* Plummer, Gen. T. 2d Dep. December, 1887).

Thus it will be seen that courts of equal standing and authority, radically differ in their respective constructions of the same terms found in sections 399, 638 and 1670.

The reasoning by which both courts reach their respective conclusions is not entirely satisfactory to us,

though we lean more toward the liberal construction, and think additional reasons can be assigned which will strongly tend to sustain that construction to which we will now refer.

The court of appeals has decided that personal appearance thirty days after the attachment has been granted will not keep alive the warrant of attachment (Blossom *v.* Estes, 84 *N. Y.* 615). But that personal appearance within thirty days after the attachment was granted will uphold the validity and full force of the warrant, though the summons has not been served either personally or by publication; because personal appearance is equivalent to personal service (Catlin *v.* Ricketts, 91 *N. Y.* 668; S. C. reported in 27 *Hun*, 242).

It will be observed that our court of last resort in that case has determined that in reading section 638, after words "personally served" must be interpolated the words "or personal appearance of defendant," the equivalent of personal service. This being so, then after the words "publication of the summons," must be interpolated the words "or substituted service of the summons," if such service is the equivalent of the former; and the same reasoning will apply to section 1670 in relation to the steps necessary to preserve the validity of a *lis pendens* filed before the summons has been actually served, and also to section 399 in relation to the steps necessary to save the cause from being barred, when the summons has not been actually served before the period of limitation applicable thereto expired.

Is substituted service under section 435 equivalent to personal service or service by publication? If it is, then the note was not barred. If it is not so, then the note was barred.

Substituted service was the creation of the law of 1853, chapter 511, and sections 435, 436 and 437 of the Code embraces the provisions of that statute with a few modi-

fications. The laws of 1853 in effect declared substituted service to be the equivalent of personal service in enacting that on the former service such proceedings could be taken as if the summons had been personally served. Section 437 of the Code changes this and declares on substituted service the same proceeding can be taken as if the service had been by publication. A comparison of these two statutes indicates that it was the intention of the law-making power that substituted service should no longer be deemed the equivalent of personal service for the purpose of all proceedings in an action, as it had been under the laws of 1853; but should be the equivalent for the purpose of all proceedings in the action so commenced of service by publication.

This view is strengthened by a reference to the codifier's note to section 437, which announces that the change assimilates the result of substituted service to the result of service by publication. It is true that the word "equivalent" is not used in section 437 in declaring the results of substituted service to be the same as the result of service by publication. But it distinctly provides these two methods of service equal in their force to sustain like proceedings in the action, in the expression on substituted service "the same proceedings may be taken as if served by publication." It is not disputed that the result of service of summons by publication after effort to serve through the sheriff would be to sustain the proceeding terminating in judgment in this action on this note, notwithstanding the six years' limitation had expired. Why should not substituted service uphold the same proceedings so resulting in judgment, when section 437 expressly declares that on such service "the same proceedings may be taken" as on service by publication? By such an interpretation the spirit and letter of section 399 are harmonized and a mere technicality in slavish adherence to the words of a single section is not permitted to work a plain injustice. There is apparently no good cause why the re-

sult of a substituted service should not operate in producing the same results as the service by publication would accomplish in defeating the plea of statute of limitations. In our opinion, section 399 should be so read that an honest effort to serve the summons before the statute of limitations runs will defeat the plea of the statute of limitations; provided such effort shall be followed, within sixty days after the expiration of the time there limited for the actual commencement of the action, by personal service thereof "(or by its equivalent, personal appearance)" or by publication of the summons "(or by its equivalent, substituted service)," which section 437 substantially pronounces an equivalent when it is there declared that all proceedings can be had upon the one that can be had upon the other, and that the one will uphold all the proceedings if the other will.

For these reasons the judgment and order appealed from must be affirmed, with costs of the appeal and disbursements.

Osborn, J., concurred.

WASSINGER, as Administrator, Etc., v. FENNELL et al.

Superior Court of the City of New York, Special Term, January, 1888.

§ 3271.

Security for costs—When administrator not required to give.

An administrator will not be required to give security for costs merely because the estate of which he is a representative has no funds except the claim in litigation; nor will the fact that the administrator is the only next of kin of the decedent require the court to exercise its discretionary power to compel the giving of such security.

(*Decided January* 11, 1888.)

Motion by defendant to require the plaintiff to give security for costs.

This action was brought by the plaintiff in his representative capacity as an administrator to recover $5,000 for the death of his intestate, caused by the alleged negligence of the defendant. It appeared that the only next of kin of the decedent, and the only person interested in the recovery in this action, is the plaintiff, and that the value of all the personal property of the decedent is nothing; that the decedent was about ten years of age at the time of death, and his estate was utterly insolvent, and the letters under which plaintiff brought this action were limited letters issued to him solely for the purpose of prosecuting the action and giving him no power to compromise the same or collect any judgment recovered therein; and that, therefore, the administrator had not given any bond as such.

John Fennell, for defendant and motion.

Frederick Lancaster, for plaintiff, opposed.

Dugro, J.—It has been repeatedly held that the court should not require an administrator to file security for costs, simply because the estate of which he is the representative has no funds except the claim in litigation (Ryan *v.* Potter, 4 *N. Y. Civ. Pro.* 80).* I cannot see why the fact that the administrator is the only next of kin of the deceased should require of the court the exercise of its discretionary power under section 3271 of the Code of Civ. Pro.; nor can I from the papers submitted believe this action to have been brought otherwise than in good faith.

Motion denied.

* See Note on Security for Costs, 4 *N. Y. Civ. Pro.* 82, 94; Carney *v.* Bernheimer, 1 *N. Y. Civ. Pro.* 233, *note.*

GILBERT *v.* FROTHINGHAM.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, JANUARY, 1888.

§§ 2442, 2443.

Referee in supplementary proceedings—Who cannot be appointed—Contempt.

Where, on a motion to punish a judgment-debtor for contempt in disobeying the direction of a referee before whom his examination is being taken in proceedings supplementary to execution, it appears that the referee was appointed upon *ex parte* application of the judgment-creditor, and that his office was connected with that of the judgment-creditor's attorney,—*Held,* that the motion should be denied, and the order for the debtor's examination, upon motion for that relief, be vacated.

(*Decided January* 16, 1888.)

Motion to punish the judgment-debtor for failure to obey the direction of the referee appointed in proceedings supplementary to execution herein, requiring him to submit to examination as to his property.

An order was granted herein requiring the judgment-debtor to appear before Joseph McCrea, thereby appointed referee for that purpose, on September 9, 1887, and submit to an examination as to his property, and on such further days as the court or referee should name. This order was personally served upon the judgment-debtor, who personally appeared pursuant to its requirements before the referee on September 9, and requested an adjournment until the 30th of that month, which was

granted. Thereafter three several adjournments of said proceedings were had, the last of such adjournments being to Saturday, October 8, 1887, when the judgment-debtor appeared in person with his counsel, was duly sworn, and his examination began and continued until 12 o'clock, noon, when an adjournment was had at the instance of the judgment-creditor's attorney, on the ground that the half-holiday law might divest the court of jurisdiction if the proceeding then continued. An adjournment was then duly directed until October 14, and thereafter the proceedings were adjourned from time to time until December 27, 1887. On December 27, 1887, the debtor appeared at 2 P. M., the hour to which the adjournment was had, and requested an adjournment to 3.30 P. M., on said day, which request was granted by the referee. At that hour the judgment-debtor again appeared and asked for a further adjournment, on the ground that his counsel was absent and could not appear; the proceedings were held for a short time to permit the judgment-debtor to secure the attendance of his counsel; but being unable to do so the proceedings were further adjourned until 4.45 P. M. on said day, when the debtor appeared with his counsel and demanded an adjournment until the following week, on the ground that said counsel could not remain and was not prepared to proceed. The plaintiff's counsel objected to such adjournment, and demanded that the examination proceed; and the referee directed that they should go on, and ordered the judgment-debtor to submit to an examination. On the advice of his counsel the judgment debtor refused to do so, and upon the adjournment being denied, left the room with his counsel. Thereafter the judgment-creditor's attorney, upon proof of these facts, obtained an order requiring the judgment-debtor to appear and show cause why he should not be punished for contempt; upon the return of which order this motion was made. It appeared that the judgment-creditor's attorney and the

referee appointed herein both had their offices in the same building.

Jones & Cochran, for judgment-creditor and motion.

S. T. Freeman, for judgment-debtor, opposed.

Daly, J.—The motion to punish the judgment-debtor for contempt in disobeying the direction of the referee is denied. The appointment of the referee falls within the prohibition of rule 80, as he occupies an office connected with that of the plaintiff's attorney. In granting orders for examination in supplementary proceedings we usually allow the attorney for the judgment-creditor to name the referee; but it is in reliance upon his not naming a person who has an office in the same building with him.

The order for examination will be vacated on motion.

LAWSON *v.* REILLY.

New York Court of Common Pleas, Special Term, January, 1888.

§ 3253.

Extra allowance—When granted in action for foreclosure of mechanic's lien—Judgment in such an action.

In an action brought under the Laws of 1885, chap. 342, § 7, to foreclose a mechanic's lien acquired under said act, an extra allowance on the ground that the action is a difficult and extraordinary one may be granted; the fact that the statute provides that costs and disbursements are in the discretion of the court does not affect the right to apply for an extra allowance where costs are allowed.

Where, in an action under Laws of 1885, chap. 342, to foreclose a mechanic's lien, the plaintiff succeeds, and it appears that an undertaking has been given pursuant to the provisions of that law to discharge the lien, the plaintiff should have judgment in form against the property and also against the owner personally, which formal judgment against the property is rendered so as to bring the case within the condition of the undertaking; but as the sureties may have become insolvent or it may be that no recovery can be had against them, the lienor ought also to have a personal judgment against the party indebted to him.

(*Decided January* 17, 1888.)

Application by plaintiff for an extra allowance of 5 per cent. on the amount of his recovery here, and also for a decree of foreclosure and sale, and directing personal judgment against the defendant for $893.94.

This action was brought to foreclose a mechanic's lien filed by the plaintiff against the property belonging to the defendant. It appeared that the plaintiff within ninety days after the performance of certain labor and services on a building belonging to the defendant, filed in the office of the clerk of the city and county of New York, in which city and county said building was located, a notice of claim in writing containing the particulars required by Laws of 1885, chapter 342, section 4, for the sum then asserted to be due him, amounting to $529.96, and caused a copy of said notice to be served upon defendant; that the defendant, for the purpose of securing the discharge of the lien, executed, pursuant to paragraph 6 of section 24 of said statute, a bond with the clerk of the city and county of New York, with two sureties, in a sum directed by one of the judges of the city court of New York, conditioned for the payment of any judgment which might be rendered against said property under said lien; that the sureties duly justified, and the bond was thereafter duly approved and an order was made by a justice of said court, discharging the said lien, which

was accordingly done. Thereafter, this action was commenced and an answer was served setting up a counterclaim, to which the plaintiff replied; the issues in the case were duly referred by consent, and the referee, after hearing proof, filed a report in which he found that the plaintiff was entitled to judgment for the sum of $454.79, with interest from October 29, 1885. Thereafter, the plaintiff made this motion for an extra allowance, for a decree of foreclosure and sale, and for personal judgment against the defendant for the sum so found by the referee, together with interest and costs aggregating $893.94.

Edgar Whitlock, for plaintiff and application.

E. T. Rice, for defendant, opposed.

Daly, J.—Under the Mechanics' Lien Act of 1885 (chap. 342), the prevailing party is entitled to an extra allowance if the action be a difficult and extraordinary one. Section 7 of the act provides that the lien may be enforced in a civil action; and section 3253 of the Code (providing for extra allowances) applies to all civil actions. The fact that in another section of the act (§ 14) costs and disbursements are made discretionary, does not affect the right to apply for extra allowance where costs are allowed. That has always been the rule in equity actions.

In this case, I think the allowance of 5 per cent. should be granted. This judgment should provide for a recovery not only against the property but against the owner personally. The recourse of the plaintiff is against the undertaking given to discharge the lien, and the judgment against the property is formal, so as to bring the case within the condition of the undertaking. But if the sureties become insolvent, or no recovery can be had against them, the lienor ought to have his personal judgment against the party indebted to him.

MARKES ET AL. v. EPSTEIN.

CITY COURT OF NEW YORK, SPECIAL TERM, JANUARY, 1888.

§§ 738, 740

Offer of judgment—Service of copy instead of original.

Service of a copy of an offer of judgment, where the original is subscribed by the party making it and indorsed with the name of his attorney, is sufficient; but even if insufficient, and the service of the original is required, the irregularity is waived by a failure to return it with the objections specifically pointed out; the defect, if it be one, constitutes a mere irregularity and does not render the offer void.

Riggs v. Waydell (78 *N. Y.* 586), distinguished.

The courts take judicial notice of the signatures of attorneys of parties to an action, but not of the parties litigant who have not appeared in person.

(*Decided January*, 1888.)

Motion by plaintiff for a new taxation of costs.

This action was brought to recover the sum of $500. The defendant appeared and answered, and at the time of serving his answer, served upon the plaintiff's attorney a paper purporting to be a copy of an offer to allow judgment in favor of the plaintiff for $100 and costs, subscribed by the defendant and indorsed with the name and address of his attorney; the paper so served was returned to the defendant's attorney by the plaintiff's attorney; thereafter the action was tried, and resulted in a verdict in favor of the plaintiff for a sum less than the amount of said offer and the defendant thereupon served

a bill of costs which was taxed by the clerk against the plaintiff's objection; the plaintiff thereupon made this motion.

Adolph Cohn, for plaintiff and motion.

Charles Steckler, for defendant, opposed.

McAdam, Ch. J.—The language of section 738 of the present is taken from section 385 of the former Code, under which the service of a copy of the offer to allow judgment was deemed sufficient (4 *Wait Pr.* 504). Section 740 of the new Code provides that unless the offer "be subscribed by the party making it" his attorney must subscribe it and annex thereto an affidavit to the effect that he is duly authorized to make it. Courts take judicial notice of the signatures of their attorneys, but not of the parties litigant who have not appeared in person (Ripley *v.* Burgess 2 *Hill*, 360; Litchfield *v.* Burwell, 5 *How. Pr.* 341); yet no affidavit is required from the party subscribing an offer, nor is any formal acknowledgment of execution necessary. If the offer served purports to have been subscribed by the defendant, the court must assume (in the absence of the evidence to the contrary) that it was subscribed by his authority, no formal proof of genuineness being required by the Code in the first instance. The plaintiff is required to accept or reject the offer at his peril.

In the present instance, a copy of the offer subscribed by the defendant was served. It is indorsed with the name of his attorney, which served as a guaranty of its genuineness and as evidence of the attorney's sanction. It is sufficient in form, and follows all the statutory requirements, and if the defendant is required to serve the original, the plaintiff waived the irregularity by not returning the copy served, with the objection specifically pointed out (Snape *v.* Gilbert, 13 *Hun*, 494; Chemung Bank *v.* Judson, 10 *How. Pr.* 133; Broadway Bank *v.* Danforth, 7 *Id.* 264). The defect, if it be one, constitutes

but a mere irregularity, and in this respect the case differs from Riggs *v.* Waydell (78 *N. Y.* 586), where the offer itself, subscribed by the attorney, was regarded as a nullity because not accompanied by an affidavit of authority. The affidavit of the attorney is by section 740 made an essential part of the offer, and its omission left the offer without statutory support. Not so here—for the defect, if it be one, consisted in serving the copy instead of the original; and while strongly impressed with the belief that the service of the copy bearing the indorsement of the attorney is sufficient, I prefer to place my decision upon the further ground that if insufficient the defect is purely technical, not substantial, and that the plaintiff was bound to return the copy served, with the defect pointed out, that it might be remedied. Good practice requires this in the interest of substantial justice.

As the offer made was, for the reasons stated, effective, and the recovery had less favorable to the plaintiff than the offer, the clerk did right in taxing the bill of costs presented by the defendant, and the taxation must be affirmed.

DOUGAN AND ANOTHER, APPELLANTS, *v.* COHEN, RESPONDENT.

CITY COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1887; AND GENERAL TERM, DECEMBER, 1887.

§§ 149, 150, 152, 573 *et seq.*

Arrest—Who admitted to liberties—New undertaking.

A defendant arrested in an action brought to recover chattels wrongfully concealed and disposed of may be admitted to the liberties of the jail upon the ordinary limit bond.

Under section 152 of the Code of Civil Procedure, if a sheriff who has taken a bond for the limits, discovers that the surety therein is insufficient, he may commit the prisoner who executed it to close confinement in the jail until another bond with good and sufficient sureties is offered, and the prisoner may give a new bond in lieu of the one on which the sureties failed to justify. The amendment of section 150 of the Code of Civil Procedure, in 1886,—making sections 573 *et seq.* of the Code, relating to the justification of bail, applicable to cases in which a prisoner has given bail for the limits,—does not affect this right.

(*Decided at special term, November* 29, 1887, *and at general term, December* 27, 1887.)

Exceptions at special term to undertaking given by the defendant, to secure his release within the limits, and motion that the sheriff be required to accept such undertaking provided the sureties therein duly justify.

The defendant was arrested in this action, which was for the recovery of chattels, upon the ground that he had concealed or disposed of the same with the intent that they could not be found, pursuant to section 549, subdivision 2, of the Code of Civil Procedure, and was held to bail in the sum of $1,200. Upon his arrest, he executed, on October 17, 1887, an undertaking for the limits. The plaintiffs excepted to the sufficiency of the sureties thereon. They failed to justify, and, on November 4, 1887, the sheriff re-arrested the defendant, who, thereafter, gave a second undertaking for the limits, which contained the same sureties who were on the former undertaking. The plaintiffs excepted both to the form and to the sufficiency of this last undertaking, and notice of justification was thereafter served for November 17, 1887. Thereafter, this application came up in due course, for hearing at chambers.

George W. Van Slyck, for plaintiff and exceptions.

Herman Joseph, for defendant, opposed.

NEHRBAS, J.—The defendant, who was arrested in this action, which was brought to recover chattels wrongfully concealed or disposed of, may, under sections 149 and 150 of the Code, be admitted to the liberties of the jail upon the ordinary limit bond (Levy *v.* Kaim, 55 *How. Pr.* 136). Section 150, since amended, provides that "the provisions regulating the justification of bail, contained in art. 3, title 1, chap. 7. . . . (§ 573 *et seq.*) govern, except as otherwise expressly prescribed in this article with respect to . . . the substitution of new sureties, or a new undertaking." But section 152 does expressly provide otherwise, to wit: if the sheriff, who has taken such a bond, discovers that a surety therein is insufficient, he may commit the prisoner who executed it to close confinement in the jail, until another bond, with good and sufficient sureties, is offered. Under this section, I think the prisoner may give a new bond in lieu of the one on which the sureties failed to justify. The sheriff is, therefore, directed to accept such new bond, provided the sureties justify on December 1, at 10 A. M.

The plaintiff subsequently duly appealed from the order entered on this decision.

George W. Van Slyck, for plaintiff-appellant.

The defendant was not entitled, after the failure of the sureties on his first undertaking for the limits to justify, to give a new or second undertaking for the limits. . .

Prior to the amendment of section 150 of the Code, the defendant, in an action to recover chattels, wrongfully concealed and disposed of by the defendant, could only obtain his release from actual custody, under an order of arrest, by giving an undertaking under subdivision 2, section 575 of the Code, to pay any judgment that might be recovered against the defendant. The undertaking under section 575 discharged the defendant from arrest. The undertaking under section 149 of the Code extends the liberties of the jail to defendants in custody

under orders of arrest as well as under final process. Levy *v.* Kaim, 55 *How. Pr.* 136. The defendant in the case at bar gave the undertaking for the limits of the jail, and was not discharged from arrest thereby. . . .

If the defendant had given bail for his discharge in this action instead of an undertaking for the limits, then, by the express provisions of the Code, the sheriff by reason of the failure of the sureties to justify, could not discharge himself from liability by the giving and justification of new bail, as this is an action to recover a chattel. See section 587 of the Code. . . . Section 150 of the Code of Civil Procedure describes the contents of the undertaking to be executed by the prisoner for the limits, and then, by an amendment passed in 1886 (chap. 648)—it provides that:

"The provisions regulating the justification of bail, contained in art. III. title I. chapter 7 of this act (§§ 573 *et seq*) govern, except as otherwise expressly provided in this article with respect to the notice of justification of the sureties; the officers before whom they must justify; the substitution of new sureties on a new undertaking; the examination and qualifications of the new sureties and the allowance of the undertaking." . . . Code, § 587, provides, "If after the defendant is arrested he escapes or is rescued, or the bail, if any, given by him do not justify when they are not accepted . . . the sheriff is liable as bail. But the sheriff may, except in all action to recover a chattel, discharge himself from liability by the giving and justification of bail as follows," etc. Mr. Justice Nehrbas recognized the force of these provisions, but held that, under section 152 of the Code, the sheriff can take a new undertaking. . . .

(*a*) This provision, it will at once be seen, is for the benefit of the plaintiff, "the party at those instance the the prisoner is in custody," so that the section does not affect the rights or the liabilities of the sheriff."

(*b*) The party must make an application to court for an order to commit the prisoner.

This proceeding can only be taken after it has been established that the sureties are insufficient. The proceedings upon the part of the plaintiff for the commitment of the prisoner can only be made after the justification of the sureties. In the case at bar, there was no justification whatever.

Herman Joseph, for defendant, respondent.

Section 587 has reference only to release to the sheriff and not the parties to the action.

That section is intended to relieve the sheriff and not to add any liability to him not already incurred.

Under appellant's theory, this section, instead of tending to relieve the sheriff, should be construed into affixing on him a liability not incurred under sections 149 and 150.

Section 587 contains an exception made in respect to actions to recover a chattel that clearly applies only to bail gived under subdivision 2 of section 575.

In such a case,—*i. e.*, bail under subdivision 2 of section 575,—the bail cannot be exonerated by the surrender of the defendant to the sheriff, because, after giving the undertaking required by such action, the sureties cannot be discharged except upon the delivery or payment provided for in the undertaking they gave, and the sheriff's power and authority under the order authorizing the arrests ends on the discharge of the defendant upon the receipt and acceptance by him of such an undertaking. It is, therefore, obvious that the sheriff could not discharge himself from bail in such an action where the sureties could not. "He, so far as the plaintiffs are affected, stands in the place of the sureties, and has become liable to the same extent to the plaintiff as they would have been if they had been accepted by him." McKenzie *v.* Smith, 48 *N. Y.* 143.

A test clearly proving that this section can have no reference to sections 149 and 150, and demonstrating that section 587 was never intended to fix a liability not existing, as here shown. "The sheriff rightfully accepts a limit undertaking under sections 149 and 150 of the Code; the undertaking provides only that the sureties shall become liable if the defendant escapes or goes without the liberties of the jail until discharged by law," etc. Upon the giving of such an undertaking, the defendant must be discharged. The sureties are excepted to; they fail to justify. The undertaking is rejected. The sheriff, under the appellant's construction of section 587 would be liable as bail, although the sureties given by defendant on defendant's discharge from arrest would not be, for they, under sections 149 and 150, incur no liability.

Browne, J.—We do not think that amendment to section 152 of the Code alters the right of the sheriff to receive, and the defendant to give a new and sufficient bond where the sureties in the first bond fail to justify. For these reasons, and those stated in the opinion of the learned justice of the court below, the order will be affirmed, with costs to the respondent.

Hall, J., concurred.

PEOPLE *ex rel.* UNION INSURANCE COMPANY AND ANOTHER, *v.* NASH ET AL., AS ARBITRATORS, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1888.

§ 2383.

Arbitration—Power to revoke—Revocation of.

It was the rule at common law that an agreement to submit to arbitration could be revoked at any time before the award was made; it was not allowable for either party to make the submission irrevocable.

Under the Code of Civil Procedure, any party to an arbitration may revoke it any time before the allegations and proofs of the parties have been closed, whether he is the only party to the controversy or one of two or more parties on the same side; and although the motives or reasons by which he was actuated may have been improper, the court has no power to take away this clear legal right.

(*Decided January* 18, 1888.)

Application on return of order to show cause for a peremptory mandamus against the defendants as arbitrators, etc., for an order directing them to proceed with an arbitration

In 1883, Thomas C. Crosby and Lorenzo Dimick composed the firm of Crosby & Dimick, of Buffalo, who were the general agents of the Union Insurance Co., of Philadelphia, and the Thomas and Mersey Marine Insurance Company, limited, of England, and the said Crosby was a general agent of the Insurance Company of the State of Pennslyvania, and the said Dimick was a general agent of the Continental Insurance Company of New York State. These four companies did business at the office of Crosby & Dimick in Buffalo during the year 1883.

Early in 1884, the Union Insurance Company, and the Insurance Company of the State of Pennsylvania, (who are the relators herein), and the Thomas & Mersey Marine Insurance Company, limited, began suit against said Dimick, charging him with systematic fraud in the conduct of such agency, and suits against the Continental Insurance Co., charging them with having been benefited by such fraud through being relieved, after the said Dimick knew of the loss of the subject insured, of insurance or reinsurance which it should have paid, but which were paid by the said Union Insurance Co., or the Insurance Co. of the State of Pennsylvania, or the Thomas & Mersey Marine Insurance Co., Limited. In the suits thus commenced against the said Dimick, orders of arrest were obtained and the said defendant Dimick held to bail in a suit by the Insurance Company of the State of Pennsylvania in the sum of $10,000, and in the suit of the Union Insurance Co. for the sum of $30,000. In November, 1885, an agreement of arbitration was entered into between the Union Insurance Co., of Philadelphia, the Insurance Co., of the State of Pennsylvania, the Continental Insurance Co. of New York, and said Dimick, whereby all disputes between the said four parties were referred to a board of arbitration consisting of Stephen P. Nash, John R. Read and James E. Carpenter. Under said arbitration agreement, the said arbitrators commenced their sitting shortly after the making of said agreement until February 27, 1887, having sat nearly 100 days, mainly in Buffalo, and having taken over 5,000 pages of testimony.

In October, 1885, Dimick, the general agent of the Continental Insurance Co., was convicted of grand larceny in the Erie county court of oyer and terminer, in defrauding. One of the methods complained of in the suit against him and against the Continental Insurance Co., the Thomas & Mersey Marine Insurance Co., of $4,975, for transferring, after he had news of the loss of the cargo

of the schooner James Wade, in November, 1883, a reinsurance which had been effected by the Continental Insurance Co., on that cargo in the Thomas & Mersey Marine Insurance Co. Dimick appealed from said conviction to the general term of the supreme court, the general term reversing the said conviction. The people appealed from said judgment of the general term to the court of appeals, and, on October 4, the conviction was affirmed and the judgment of the general term reversed. Upon that day, the arbitrators were engaged in session under said arbitration agreement at Buffalo, and said Dimick, learning that the court of appeals had affirmed said conviction, fled to Canada. The counsel for Dimick withdrew from said arbitration proceedings.

On October 5, on the next hearing before the arbitrators, which hearing took place at the city of New York on October 27, 1887, Dimick, through the counsel of the Continental Insurance Company, presented that his claim to be the revocation of the arbitration agreement after the presentation of said revocation argument was had before the arbitrators as to the effect of the said arbitration, the counsel for the Union Insurance Company and Treadwell Cleaveland, maintaining that such revocation was of no effect, and the counsel for the Continental Insurance Co. claimed that it was efficacious and absolutely terminated the powers of the arbitrators. The arbitrators differed as to the effect of the revocation.

At the last hearing of said arbitrators until the time of delivering opinions by the arbitrators expressing their entire willingness to proceed, at any indication from the court that it was their duty so to do, stated that they regarded that they were obliged to come to the conclusion, that their powers had come to a termination of said agreement.

At the time of making the arbitation agreement all the suits which were pending by the Union Insurance Co. and the Insurance Co. of the State of Pennsylvania against

said Dimick or the Continental Insurance Co. were discontinued; those against Dimick upon consents and the security of the bail-bond which had been given in the suit against Dimick were lost thereby; and said Dimick being in Canada now it is impossible to again arrest him. It is, therefore, claimed by the relators to be of the greatest importance to them that the arbitration proceedings herein should not be terminated, but should proceed to award; as otherwise they will be practically remediless against said Dimick in their claims against said Dimick as distinguished from their claims against the Continental Insurance Co.

Evarts, Choate & Beaman, for relators and motion.

Butler, Stillman & Hubbard, for Continental Insurance Company.

Andrews, J.—It was beyond question the rule at common law that an agreement to submit to arbitration was revocable at any time before the award was made (Tobey *v.* Bristol Co., 3 *Story*, 800; *Morse on Arbitration*, 230; Curtis *v.* Barnes, 30 *Barb.* 225; Bank of Monroe *v.* Widner, 11 *Paige*, 534; Frezer *v.* Ehrensberger, *L. R.* 12 *Q. B. Div.* 310). And it seems to have been equally well settled that it was not competent for either party to make the submission irrevocable (*Re* Rome & Meser, *L. R.* 6 *C. P.* 218; Vignoir's case, 8 *Co. Rep.* 81 b; *Morse on Arbitration*, 230; Tobey *v.* Bristol Co., 3 *Story*, 800).

And by the provisions of the Code of Civil Procedure any party to a submission may revoke it, whether he is a sole party to the controversy or one of two or more parties on the same side (Code Civ. Pro. § 2383). This provision of the Code is new, and it is stated in the note by the revisers that it was intended to settle the conflict between the decisions, previously made on that subject. It was, therefore, competent for Dimick to revoke the submission at any time before the allegations and proofs of the par-

ties had been closed (Code Civ. Pro. § 2383), and although the motives or reasons by which he was actuated may have been improper, the court has no power to take away his clear legal right.

If the cases from the Pennsylvania reports hold a different doctrine, they are opposed to the whole current of authority in this State and cannot be followed by me.

For these reasons, I am of the opinion that the motion for a mandamus directing the arbitrators to proceed should be denied, but under the circumstances, without costs.

PEOPLE *ex rel.* POST *v.* GRANT, Sheriff, etc.

Supreme Court, First Department, New York County, Special Term, January, 1888.

§§ 2273, 2278, 2285.

Contempt—Jurisdiction of proceedings to punish for—Habeas corpus —What may be inquired into on—When not proper process to bring up party for punishment as for contempt—Former adjudication.

An order of the general term affirming an order adjudging the defendant in an action in contempt in disobeying the provisions of a judgment from which an appeal was pending, which necessarily determines that there was no statutory stay of proceedings by the appeal taken from such judgment, is *res adjudicata* as to the question of the existence of such stay upon an application by habeas corpus to discharge the defendant from imprisonment under an order adjudging him in contempt for disobeying an order subsequently made in the action.

Where a judgment in an action directed the officers of a corporation to transfer certain stock to the plaintiff in the action, and thereafter an order was made on a motion for further instructions at the foot of the final judgment fixing a time and place when all the officers of the corporation should attend at its office for the purpose of transferring

the stock, and subsequently another order was made changing the time when they should so attend for that purpose,—*Held*, that one of said officers being a defendant in the action the court had jurisdiction of his person and of the subject matter; and, therefore, if said orders were erroneous they were not absolutely void and could not be disregarded on an application to discharge such officer from imprisonment under an order adjudging him in contempt for failure to obey them ; that the question as to whether said orders were properly served could not be reviewed on habeas; corpus but the proper way to review it was by appeal from the order adjudging the officer in contempt, and he could only obtain a writ of habeas corpus in case of want of power or jurisdiction in the court.

People *v*. Stuyvesant (9 *N*, *Y*. 263), followed.

The provisions of the Code of Civil Procedure, section 2278,—directing that where a defendant is in custody under a commitment for contempt, etc., a warrant of attachment cannot issue, but that the court must, upon proof of the facts, issue a writ of habeas corpus, directing the officer to bring up the accused before it to answer for the offense charged—does not provide that the proceeding by an order to show cause cannot be taken; and under the Code said provision does not render the court powerless to punish for contempt, save by proceedings instituted by habeas corpus.

Under the Code of Civil Procedure, proceedings to punish for contempt may be instituted in one of two ways,—to wit, either by an order to show cause or by the issuing of a warrant of attachment,—but where the one charged with the offense is in custody, a habeas corpus must be issued instead of a warrant of attachment. In interpreting the provisions of the Code providing for the issuing of an attachment in such a case, the maxim *expressio unis est exclusio alterius*, applies.

It is doubtful whether one charged for a contempt who has been previously committed for a contempt and placed in the custody of his counsel is in the custody contemplated by section 2278 of the Code of Civil Procedure so as to prohibit the issuing of a warrant of attachment and to require the granting of a habeas corpus instead.

Where an officer of a corporation was required by a judgment to transfer certain stock to the plaintiff, and thereafter, for his disobedience of such command, was committed for contempt, and was thereafter by orders of the court directed to meet the other officers of the corporation at a time and place designated, for the purpose of executing such transfer, and was also subsequently committed for his contempt in failing to obey such orders—*Held*, that the disobedience of the order and of the judgment was distinct and it could not be fairly

said that he was committed or punished twice for the same offense; that he could purge himself at once of either commitment by doing the act directed to be done; that even if the court exceeded its power in imposing the second fine, as the imprisonment in either or both of the orders was only until he had performed the act or paid the fine, he will be discharged on the performance of the act or the payment of the fine required, and that the excessiveness of the fine, it be such, would not vitiate the last order of commitment.

Instance of a case in which it was held that an order of commitment for contempt specifically and plainly set forth the act which the one committed was required to do.

(*Decided January* 23, 1888.)

Application on *habeas corpus* for the discharge of the relator from imprisonment under an order committing him for contempt.

One Kings brought an action against Barnes and others, including the relator, for the specific performance of a contract, whereby, among other things, the defendant agreed to transfer certain certificates of stock of a corporation known as the New York Transfer and Terminal Company, Limited. Judgment was entered on May 17, 1887, in the action, directing, among other things, that the relator, the president of said corporation, transfer said stock to the plaintiff; and on July 12, 1887, a formal demand was made upon the relator for the transfer of said stock, which he refused to make. On July 13, 1887, Mr. Justice Barnard granted an order requiring him to show cause why he should not be punished for his contempt in not complying with the requirements of said judgment; and, on July 20, an order was entered adjudging him guilty of contempt for his said disobedience and committing him to the Richmond county jail until he paid a fine thereby imposed and transferred the said stock. On July 21, 1887, a formal commitment based upon this order was signed by Mr. Justice Donohue, and on the same day relator obtained a writ of *habeas corpus* under which he was brought before Mr. Justice Potter, on July 25, 1887, and an application made for his dis-

charge. Said justice heard the application and reserved his decision, and, up to December 7, 1887, had not rendered any decision. The relator thereafter remained in the custody of his counsel by consent of the parties.

It was claimed by the relator that the proceedings should have been taken against all the officers of the said corporation, and that he, as president, could not alone do the acts necessary to make a valid transfer of the stock of the corporation upon its books; that the other officers of the corporation were not under his control, and its seal was not in his possession; and that his refusal to make the transfer was justified by these facts, and also by the fact that the plaintiff had presented to him stock certificates with defective powers of attorney. Thereafter an appeal was taken by the relator herein from the order of Mr. Justice Barnard, granted July 20, 1887, adjudging him in contempt, and that on the appeal he claimed that the order was irregularly and improperly granted and the court without jurisdiction to make it, for the reason that there was an absolute statutory stay of all proceedings in the action and under the judgment by virtue of Code of Civil Procedure, §§ 1310, 1328, because an appeal had been taken from the judgment in King *v.* Barnes.

The general term of the supreme court in the second department affirmed the aforesaid order adjudging the relator in contempt; the plaintiff thereafter, to avoid as far as possible all technical objections, applied to Mr. Justice Barnard for further directions at the foot of the final judgment, fixing the time and place when all the officers of the corporation should attend at its offices with its books and seals for the purpose of transferring said stock as required by the judgment; and an order was made directing that this be done on November 5, 1887, and a certified copy thereafter duly served on all the officers of said corporation, including the relator herein; obedience to this order, however, was prevented by the granting of temporary stays obtained by this relator; and

thereafter, on December 3, 1887, another order was made changing the time at which the officers of the corporation were directed to attend at their offices for the purposes aforesaid, and the certified copy of this order was also duly served at all of said offices, including this relator. The relator failed to obey the last mentioned order, and, on December 17, 1887, an order was made adjudging him guilty of contempt on account of such disobedience, and a commitment was issued against the relator. The proceedings resulting in the making of this order were commenced by an order in the usual form requiring the relator to show cause why he should not be punished for his disobedience as for contempt; the relator claimed that these papers were served upon him by a person who was intoxicated, and that the service was defective for the reason that although copies of the motion papers and of the order to show cause were delivered to him, the signature of the justice on the original order to show cause was not exhibited to him. After the granting of this second order of commitment, the relator procured the habeas corpus upon which the present application is made.

Noah Davis, for the relator and application.

McFarland, Boardman & Platt, for plaintiff, opposed.

Lawrence, J.—The general term of the second department, in affirming the order of July 50, 1887, necessarily determined that there was no statutory stay by the appeal taken from the final judgment of May 17, 1887. I am bound by the decision of the general term, and that question, therefore, cannot be regarded as open for discussion in this proceeding.

The court certainly had jurisdiction of the person of the relator, as a defendant in the action, and of the subject matter, and, therefore, if there was no statutory stay, even if the orders of November 5, and December 3, were

erroneous, they were not absolutely void, and cannot be disregarded by me on *habeas corpus*. The learned justice who made those orders having determined, as matter of fact, upon the papers before him, that the order of December 3 was properly served, his determination on that point cannot be reversed on *habeas corpus*, brought for the purpose of inquiring whether the order of December 17 was properly made. The proper way to review each of those orders seems to me to be by appeal, and not by this writ, by which relief can only be afforded in case of want of power or jurisdiction in the court.

In the leading case of People *v.* Sturtevant (9 *N. Y.* 263), the court of appeals held, that an injunction granted in a case in which the court had jurisdiction, if erroneously granted, is voidable only and not void, and, until set aside, is entitled to obedience. In that case, JOHNSON, J., in delivering the opinion of the court, says: "The principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. The method of correcting error is by appeal and not by disobedience. A party proceeded against to an order or judgment is never allowed to allege as a defense for his misconduct that the court erred in its judgment. He must go further, and make out that in point of law there was no order and no disobedience, by showing that the court had no right to judge between the parties upon the subject."

It is said, however, that by the appeal to the court of appeals, the supreme court lost all control in the case of King *v.* Barnes, and that, therefore, any orders made subsequent to such appeal are null and void. The answer to this proposition seems to be, that the general term has already decided that there was no stay of execution by reason of the appeal, and that by that decision I am bound. On a direct application to vacate the order of December 3, made at the special term in the second department, the relator was defeated and the general

term of the same department by affirming the order of Justice BARNARD, dated November 5, again decided that nothing which the relator had done by way of appeal or otherwise had effected a stay. Applying the principles enunciated in the Sturtevant case to this state of facts, I conclude that the orders now the subject of consideration are, if voidable, not void. If there was no stay, the supreme court did not lose its power to enforce its own judgment by the appeal. It has the right to determine the question whether such stay has been effected; and, whether its determination upon that point was right or wrong, it cannot be reversed here. If these views are correct, they dispose of many of the questions which were so elaborately presented on the argument, and it is only necessary to consider whether, by the procedure adopted in this case, the court, having jurisdiction of the defendant generally and of the subject of the action, obtained jurisdiction over the relator to punish him for the alleged contempt.

After examining section 2278 of the Code, relied upon by the relator's counsel, I am of the opinion that such jurisdiction was obtained. That section is taken from sections 7 and 9 of title 13, of chapter 8, of part 3 of the Revised Statutes, and the practice under it was to issue the writ of habeas corpus in aid of an attachment (see 22 *Wend.* 635).

The present Code provides that in such a case,—*i. e.*, where the prisoner is in the custody of a sheriff or other officer under a mandate for any other contempt,—the warrant of attachment cannot be issued, but the court, upon proof of the facts, must issue a habeas corpus directed to the officer, etc. It does not provide that the proceeding by an order to show cause cannot be taken. Under the Code, as under the Revised Statutes, there are two modes of proceeding against a person who is charged with a contempt,—to wit, either by an order to show cause, or by the issuing of a warrant of attachment. It is only

the latter procedure that the court is prohibited from taking by section 2278; and the reason for making the distinction between the two methods of procedure is obvious upon reference to 2273 of the Code,—which provides that the "order to show cause may be made either before or after the final judgment in the action, or the final order in the special proceeding; that it is equivalent to a notice of motion, and the subsequent proceedings thereupon are taken in the action or special proceeding as upon a motion made therein. A warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused in behalf of the people upon the relation of the complainant."

The proceeding by order to show cause being in the action, if there was no stay, as the general term has determined, that being no prohibition against taking an ordinary proceeding in the cause, contained in section 2278, but only a prohibition against starting an original proceeding in behalf of the people against the accused, I do not think that the rules of statutory construction require that it should be held that that section renders the court powerless to punish for contempt save upon a proceeding instituted by habeas corpus.

The maxim, "*Expressio unius est exclusio alterius*," I think applies (And see Pitt *v.* Davidson, 37 *N. Y.* 235). I think, also, that it may well be doubted whether the relator was in the custody contemplated by section 2278 of the Code at the time this writ was allowed. He was not in the custody of the sheriff, but had been placed, by the consent of the parties, in the custody of his counsel, pending the proceedings before Mr. Justice Potter for his discharge on habeas corpus; and section 157 of the Code seems to regard the special direction of the court committing the prisoner on habeas corpus to other custody than that of the sheriff, as a permission to the sheriff to allow the prisoner to go at large, as contradistinguished from the actual confinement upon the process

for contempt. Nor can it fairly be said that it is attempted to punish the relator twice for the same offense. The act required to be done by the orders of July 20 and December 5 may be substantially the same, but the disobedience of each order is distinct, and the prisoner can purge himself at once of either contempt by doing the act directed to be done (*Code Civ. Pro.* § 2285).

The act which the relator is required to do, is plainly and specifically set forth in the order of December 17, 1887,—to wit, to execute and deliver to the plaintiffs or to the sheriff, for their account, the new certificates of stock directed by the orders of November 5 and December 3, 1887, to be transferred on the books of the corporation; and it is the failure to do this act in obedience to such orders which is the contempt charged. This is a compliance with the provisions of the Code (See §§ 2032–2034).

Since this proceeding has been before me, Mr. Justice Potter has rendered his decision in the proceeding instituted to inquire into the legality of the relator's confinement under the order of July 20, 1887, and has dismissed the writ and remanded the prisoner. If it is contended that the prisoner ought not to be subjected to the payment of two fines and two imprisonments for the same offense, and that, therefore, he should be discharged on this writ from the imprisonment, the answer seems to be, that even if the Court exceeded its power in imposing the second fine, as the imprisonment under either or both of the orders can only be until he has performed the act and paid the fine (*Code*, section 2285), he will be discharged upon the performance of the act and the payment of one fine, and that the imposition of the excessive fine, if it be such, will not vitiate the whole order of December 17, 1887 (People *ex rel.* Wolf *v.* Jacobs, 66 *N. Y.*, 8), and the remarks of Rapallo, J., as to the decision in People *ex rel.* Tweed *v.* Liscomb (60 *N. Y.* 559). In this case the relator has paid neither of the fines, nor performed the act required to be done by either of the orders.

For these reasons, I am of the opinion that the writ should be dismissed.

LYON, as Administrator, etc., of RALPH LYON, Deceased, v. CAHILL.

Superior Court of the City of New York, Special Term, November, 1887.

§§ 55, 1362 *et seq.*

Execution—Presumption as to authority to issue—When authority of attorney terminates.

Where, after the taking of an appeal and the giving of an undertaking to stay proceedings, the plaintiff's attorney issued an execution on the judgment appealed from,—*Held,* that the authority of the attorney terminated with the entry of judgment; that, in the absence of evidence that the plaintiff directed, authorized or sanctioned the act of the attorney, he was not responsible therefor, and the issuing of said execution did not operate to relieve the sureties on the undertaking on appeal.

Although in many cases the regular and lawful issuance by an attorney of an execution on a judgment will be presumed to be authorized by the client, no such presumption attaches where the issuing of execution is not only without authority but in direct violation of a positive prohibition of law, whereby such proceedings on his part were stayed.

(*Decided November* 2, 1887.)

Trial of action before the court without a jury.

On October 8, 1887, the plaintiff herein, Ella A. Lyon, as administratrix, etc., of Ralph Lyon, deceased, recovered a judgment in the New York court of common pleas for $696.84. Said Lyons appealed from said judgment and gave an undertaking to stay execution, upon which one Thomas Kilgere and the defendant herein, William Cahill,

were sureties. In 1884 the defendant in the said action, Lyon, departed this life, the appeal then being undisposed of, and in 1886 letters of administration on his estate were duly granted to the public administrator, and the said appeal was thereafter dismissed. The surety Kilgere died in 1884. The original attorney for the plaintiff in said action was one McGrath, who is now dead and who in 1878, notwithstanding the fact that the proceedings were stayed by the giving of the aforesaid undertaking, issued an execution on said judgment to the sheriff of the city and county of New York. Thereafter, the plaintiff herein brought this action upon said undertaking on appeal against this defendant as surviving surety thereon.

John Brooks Leavitt (*Leavitt & Keith*, attorneys), for plaintiff.

Charles W. Hassler (*Hassler & Sabine*, attorneys), for defendant.

Defendant has been entirely released from liability by the issuing of the execution by plaintiff's attorney in 1878. . . . . It is not disputed that—(1) McGrath was in 1877 plaintiff's duly authorized attorney, and was until his death in 1886. (2) Leavitt succeeded McGrath and now is her attorney. Having appeared by attorney, the plaintiff "cannot appear in person." *Code. Civ. Pro.* § 1240. Execution is to be issued by the attorney. Brush *v.* Lee, 36 *N. Y.* 49; Guilleaume *v.* Rowe, 94 *Id.* 268; affirming 16 *J. & S.* 169; Fishkill S. I. *v.* Nat. Bk., of Fishkill, 80 *N. Y.* 162. Execution was issued by McGrath. It was regular in form. It was received and acted upon by the sheriff. *Code Civ. Pro.* § 1368. There was no irregularity in the undertaking. "If the obligee for any sufficient reason elects to treat the undertaking as invalid and proceeds to collect his judgment in disregard thereof, he cannot afterwards maintain an

action upon it, and hold its obligors to liability hereon." . . . To hold that the obligee may enforce such an undertaking after repudiating it as a stay, would authorize a recovery by one party, without requiring the performance by him of an implied condition, and compel the payment of obligations by the other, for which he has received no consideration. . . . "We deem it immaterial whether anything might have been collected on the execution or not." Hemmingway *v.* Poucher, 98 *N. Y.* 281, 285.

"The respondent cannot have the dual right to enforce the judgment during the appeal as if no undertaking had been given, and at the same time treat it as valid security for the payment of the judgment." Manning *v.* Gould, 90 *N. Y.* 480.

If the party sets the attorney in motion, he is liable as the same progresses, and if judgment is in his favor, is responsible for the methods resorted to for the enforcement of the judgment. Guilleaume *v.* Rowe, 94 *N. Y.* 268; S. C., 16 *J. & S.* 169; 63 *How.* 175.

It is only when, after having issued the execution, the attorney undertakes to give special directions not warranted by the language of the writ that the client is not liable. Guilleaume *v.* Rowe, *supra;* Welsh *v.* Cockran, 63 *N. Y.* 181.

If the attorney, either through ignorance of the law or negligence, made a mistake, the act is none the less that of the client. Poucher *v.* Blanchard, 86 *N. Y.* 262, 263.

O'Gorman, J.—The computation of the amount at stake in this controversy at $276.74, seems to be in accordance with the principle stated by me on the trial to be correct.

Whether plaintiff is entitled to recover this amount from the defendant depends on the determination of the question, whether the sureties, the survivor of whom is the present defendant, were relieved of responsibility on the appeal bond executed by them, because of the issue of

execution against the judgment debtor in the original action notwithstanding the stay of proceedings subsequent to the filing of the bond.

There is no evidence that the plaintiff directed, authorized or sanctioned the act of the attorney who issued the execution. He had been the attorney acting for the plaintiff in the action, but his authority, strictly speaking, terminated on the entry of the judgment. (Ward *v.* Sands, 10 *Abb. N. C.* 60, and, although, in many cases, the regular and lawful issue of execution on the judgment might be presumed to be authorized by the client, no such presumption could attach to the issue of execution not only without authority but in direct violation of a positive prohibition of law, whereby such proceeding on his part was stayed.

This act was the act of the attorney, for which he alone was responsible, and the plaintiff is not estopped or deprived of any right to bring this action.

The plaintiff should have judgment against the defendant for $276.74, with costs.

PEOPLE OF THE STATE OF NEW YORK *v.* ALDEN.

SUPREME COURT, THIRD DEPARTMENT, WARREN COUNTY, SPECIAL TERM, JANUARY, 1888.

§§ 2863, 3228, 3229.

Costs—By whom recoverable in action for violation of game laws.

Where, in an action to recover penalties for an alleged violation of the game laws, judgment was rendered in favor of the defendant, dismissing the complaint, with costs against the county whose district attorney brought the action, and judgment therefor was accordingly entered,—*Held,* that the proper mode of determining whether the

defendant was entitled to costs was by a motion by the plaintiff to strike such costs from the judgment.

It is ordinarily presumed that when a justice of the supreme court awards costs to a party to an action, that the law gives him the power to make such award, and this is especially true where the justice granting the costs never decides any question without examining the law conferring the power upon him.

In an action to recover penalties for a violation of the game law, the plaintiff is entitled to costs if there is a recovery of damages or of a penalty, and whenever the plaintiff fails to obtain the recovery, the defendant is entitled to costs against the plaintiff. The statute providing that the district attorney may discontinue such action without costs, it does not relieve the plaintiff in such an action from liability for costs in case he is defeated.

(*Decided January*, 1888.)

Motion by district attorney of Warren county to strike out costs contained in judgment in favor of defendant.

The facts appear in the opinion.

Charles R. Patterson, district attorney of Warren county, for the motion.

S. & L. M. Brown, for defendant, opposed.

Potter, J.—This is a motion to strike out the costs adjusted by the clerk and inserted in the judgment dismissing the complaint herein upon the merits, with costs against the county of Warren.

The ground of the motion is that the statute does not allow costs to the defendant in any action brought by the district attorney to recover penalties under the acts protecting, deer, fish, etc., and that, therefore, the judgment awarding the costs of the action upon dismissing the complaint was unauthorized.

It is to be ordinarily presumed that, when a justice of the supreme court awards costs to a party, that the law gives the judge the power to make such award; and that is especially true when the costs are awarded by the learned judge who granted the costs in this case, for he never

decides any question without examining the law conferring the power to be exercised by him. I think the district attorney has pursued a proper remedy to raise the question of the power of the judge to award costs, and, in this case, if it is found that the power does not exist, the judgment may be corrected by striking out the costs.

The question, then, upon this motion is, does the law give the defendant costs in this case, or give the court trying the case any discretion to award the defendant the costs of the action?

The general rule in relation to costs in actions of this character, and to recover penalties, is to be found in *Code Civ. Pro.* §§ 2863, 3228, 3229. By these sections it is plain that the defendant would be entitled to costs of the action in this case.

Where is there any statute changing the rule derivable from those sections of the Code?

The district attorney presents, as an answer to that question, section 6 of chapter 653 of the Laws of 1880. That section is as follows: "Any action brought or prosecuted by any district attoney pursuant to the provisions of the section hereby amended, may be discontinued by said district attorney, and neither costs nor disbursements in *such* action shall be recovered by any defendant therein."

I think that *that* section only provides for an action which the district attorney has or may discontinue, for these reasons: it may be reasonably assumed that the rules applicable to costs in actions generally apply to actions brought under the provisions of the game laws. If that is so, the defendant would recover the costs of an action where the plaintiff was not entitled to the costs of the action, and that would be in all cases where the plaintiff failed to obtain a recovery entitling him to costs, or where he was non-suited, or where the plaintiff, without the leave of the court, discontinued the action. It is by virtue of these provisions that costs are allowed in any

action. If they do not apply to this class of cases, then the plaintiff is not liable to pay costs to the defendant in any event, either when the plaintiff failed to recover upon a trial of the action, or when he should discontinue the action, and hence there was no occasion for the amendment by the act of 1880; and if the legislature had intended to exempt the plaintiff in any event of the action, its language would have been general, and no reference would have been made to a discontinuance.

That the sections of the Code in relation to costs apply to this class of actions, is made more clear by the act of 1883, ch. 317, which provides, "Witnesses' and other fees and disbursements and full costs shall be included in any judgment in favor of the People at the rates fixed by section 3251, without reference to the amount of the recovery." This legislation indicates very clearly that the same rules provided by sections 3251, 3228, 3229, that are applicable to actions generally, apply to this class of actions. This section is based upon the idea that the plaintiff is to recover costs in actions brought under the statutes for the preservation of game, pursuant to section 3228, but modifies subdivision 4 of that section, so that plaintiff may recover full costs, though the amount of the damages or penalty recovered be less than fifty dollars.

It is plain from this feature of section 1, above quoted, that the plaintiff in this class of actions may recover costs of the defendant whenever there is a recovery of damages or of a penalty, and whenever the plaintiff fails to obtain a recovery in the action, section 3229 gives the defendant the costs of the action against the plaintiff. If it were not so, the contention of the plaintiff would lead to the inequitable or unreciprocal result, that the plaintiff, in no event of the action, is liable to pay costs to the defendant, and may recover costs from the defendant, whenever there is a recovery, for any amount of damages or penalty, however small, by the plaintiff.

I do not think the legislature intended such result.

The motion should be denied, with $10 costs of motion.

SEIFRET, AS PRESIDENT, ETC., v. KRAFT, AS PRESIDENT, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1888.

§§ 1720, 1721.

Replevin—When complaint in action for, insufficient.

Where a complaint in an action to recover the possession of goods and chattels alleged that the plaintiff was lawfully possessed of certain property, it sufficiently avers the plaintiff's title.

Where, in an action to recover the possession of personal property, there is no allegation that the defendant wrongfully took the chattel, but simply an allegation that he wrongfully detains it, the facts showing that detention is wrongful must be set forth, and in case the complaint does not set forth such facts, it is insufficient and does not state a cause of action.

Scofield *v.* Whitlegge (49 *N. Y.* 259); Goodwin *v.* Wertheimer (99 *Id.* 149); Davenport Glucose Mfg. Co. *v.* Taussig (5 *N. Y. Civ. Pro.* 69), followed.

(*Decided January* 16, 1888.)

Demurrer to complaint on the ground that it fails to state facts sufficient to constitute a cause of action.

The opinion states the facts.

D. Leventritt, for defendant and demurrer.

A. P. Fitch, for plaintiff, opposed.

O'BRIEN, J.—This is an action for the recovery of the

possession of personal property alleged to be wrongfully detained.

To the complaint the defendant demurs on the ground that it does not state facts sufficient to constitute a cause of action. After stating that the plaintiff was lawfully possessed of the property, the complaint alleges that "the defendant wrongfully detained said goods and chattels from the possession of the plaintiff, and still wrongfully and unjustly detains the same."

No complaint is made as to the taking, the action being based solely upon an alleged wrongful detention.

The averment as to plaintiff's title is sufficient under section 1720 of the Code. There is, however, no allegation of a demand and refusal, nor is there any setting forth of facts showing that the detention is wrongful as required by section 1721 of the Code.

This latter section provides that where the complaint contains a general allegation that the defendant "wrongfully took" the chattel, it is sufficient. Where, however, the "wrongful detention" is alone complained of, the complaint must set forth the facts showing that the detention was wrongful,

In Scofield *v.* Whitlegge (49 *N. Y.* 259), it was held that where the action is for a wrongful detention without the wrongful taking, the averment of a demand and a refusal is necessary (See also Goodwin *v.* Wertheimer, 99 *N. Y.* 149). In the case of the Davenport Glucose Manufacturing Co. *v.* Taussig (5 *N. Y. Civ. Pro.* 69), the general term of this department refused to strike out certain allegations of the complaint, stating as a reason that as section 1721 required the complaint in actions of this kind to set forth the facts, that the plaintiff should not, therefore, be obliged to incur danger from an omission to state the facts required by the section.

The conclusion to be drawn from this last cited case is evident, namely, that in actions for the wrongful detention, where no wrongful taking is claimed or alleged, the

facts showing the detention to be wrongful must be set forth, and the mere naked allegation that the defendant wrongfully detains the property is not sufficient.

For these reasons, the demurrer must be sustained, with costs to the defendant, and with leave to plaintiff to amend the complaint.

REEVES, Respondent, v. HYDE and Another, Appellants.

New York Court of Common Pleas, General Term, February, 1888.

§ 640.

Attachment—Expert evidence fixing value of attorney's services.

In an action upon an undertaking on an attachment to recover damages resulting therefrom, consisting of counsel fee incurred by the plaintiff in securing the vacation of the attachment, the jury is not limited, in determining the value of services rendered by counsel, by the testimony of expert witnesses to the effect that their value was between $150 and $250.

In an action in which the value of labor and property is involved expert witnesses furnish much assistance to courts and juries, but their testimony is not controlling, and where the value of professional services is to be passed upon, it is the duty of the jury to consider such testimony and judge of its weight and force, and from the evidence in the case as to the nature of the services, time occupied in them and the benefit derived from them, determine what, in their judgment, is their value. After receiving all the aid they can from the opinions of expert witnesses, the jury must exercise their own judgment as to the value of the services.

Head v. Hargrave (105 *U. S.* 45), followed; Leitch v. Atlantic Ins. Co. (66 *N. Y.* 100), distinguished.

(*Decided February* 6, 1888.)

Appeal by defendants from judgment of general term

of city court of New York, modifying judgment of trial term of that court and affirming it as modified.

The opinion states the facts.

W. B. Tullis, for defendants-appellants.

The court erred in directing the jury that the opinion-ative testimony of experts as to the value of Galinger's services was conclusive. Head v. Hargrave, 105 *U. S.* 45, and cases therein cited. . . . The charge as made precluded the jury from considering the following circumstances, both of which were elements of the measure of damage: (A) The statutory costs of the attachment suit, viz., $33, which the law allows by way of indemnity, and is competent evidence of plaintiff's damages for his attorney's service, and which were paid. Foster *v.* Newbrough, 66 *Barb.* 645. (B) The amount involved in the attachment suit, $502.62. Garfield *v.* Kirk, 64 *Barb.* 464.

George W. Gallinger, for plaintiff-respondent.

The expert testimony, as to value, is clearly admissible and is well settled. Such expert testimony rests upon the necessities of the case. The evidence of such witnesses may be slight and weak, but is the evidence of some experience and judgment, which may *not* be entirely excluded. Slater *v.* Wilcox, 57 *Barb.* 609.

The defendants' exception to the refusal of the court to charge: "That the jury is not bound to take the evidence of witnesses as to value of services; but may, on their own judgment and experience, determine for themselves the value of the services irrespective of the evidence of witnesses," is not well taken. Leitch *v.* Atlantic Mutual Ins. Co., 66 *N. Y.* 100. . . . The jury were bound to regard the uncontradicted evidence of unimpeached witnesses. Townsend Manf'g. Co. *v.* Foster, 51 *Barb.* 346; S. C., aff'd, 41 *N. Y.* 620; Templeton *v.* People, 3 *Hun*, 360.

ALLEN, J.—This is an appeal from a judgment of the general term of the city court affirming a judgment entered upon the verdict of a jury, upon reducing the same $23. The action was brought upon an undertaking on attachment for $250, executed by the defendants as sureties, which attachment had been vacated. The damages sought to be recovered in said suit were counsel fees incurred by the plaintiff in the attachment proceedings. The plaintiff was given a verdict of $200, and a judgment was entered thereon, which was modified and affirmed by the general term of the city court. On the trial, witnesses were examined as experts in reference to the value of the professional services of the plaintiff's counsel. Two of them testified that the services were reasonably worth the sum of $150, and the other witness, who was the attorney for the plaintiff, testified that they were worth the sum of $250. The court instructed the jury as follows:

"You will determine from the evidence presented to you from the witness stand what compensation between $150, as fixed by some of the witnesses, and $250 by Mr. Galinger himself, he would be entitled to," etc. "But as to the value of the services you are *bound* by the evidence presented by witnesses from the witness stand; you are not to rely upon any judgment that all or either of you may have as to what compensation you should give an attorney for such services."

The defendants excepted to the charge that the jury must find any sum between $150 and $250, provided all the services testified to had been rendered; also to the charge that the jury were bound by the testimony of the witnesses produced by the plaintiff on the question of the value of the services rendered.

We think the court erred in this instruction, and that the defendants' exceptions are well taken. According to the charge, the jury were bound to find for the plaintiff for some sum between $150, which was the lowest, and

$250, which was the highest estimate of the value by the professional witnesses. In other words, the value of the services was to be determined exclusively upon the testimony of the witnesses.

In cases in which the value of labor and property is involved, expert witnesses furnish much assistance to courts and juries; but their testimony is not controlling. Where, as in this action, the value of professional services is to be passed upon, it is the duty of the jury to consider such testimony and judge of its weight and force, and, from the evidence in the case as to the nature of the services, the time occupied in them, and the benefit derived from them, determine what, in their judgment, is their reasonable value. After receiving all the aid which can be obtained from the opinions of expert witnesses in regard to the reasonable value of the services, the jury are still called upon to exercise their own judgment upon all the facts in the case.

The precise question presented here was decided in Head *v.* Hargrave, 105 *U. S.* 45. In that case, the trial judge had charged: "You must determine the value of the services rendered, from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services." The judgment was reversed on appeal. Justice Field, delivering the opinion of the court, says: "It is the jury's province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given."

Counsel for the respondent relies upon a remark of

ALLEN, J., in Leitch *v.* Atlantic Mut. Ins. Co., 66 *N. Y.* 188, in which that learned judge says that when the evidence of experts is necessary for the reason that the materiality of circumstances affecting the risk is not sufficiently obvious to enable the court or jury to decide upon the fact, and if there is no conflict, the fact of materiality must be held as all the witnesses testified. This was said with respect to cases where none but experts are capable of determining the question, but is not applicable to this case.

We find no error in this case except the one above referred to. For this error, however, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

CROSSITT, JUDGMENT CREDITOR, *v.* WILES, JUDGMENT DEBTOR.

SUPREME COURT, FOURTH DEPARTMENT, MADISON COUNTY, SPECIAL TERM, JANUARY, 1888.

§§ 1362 *et seq.*; 2464 *et seq.*

Execution—How issued on joint judgment—Receiver in supplementary proceedings.

Where a judgment was recovered in an action for a joint assault against two defendants and an execution issued against the property of one of them only,—*Held,* that such execution was not illegal and void; [1, 5, 9,] that upon the return thereof, supplementary proceedings could be maintained against the debtor, against whose property the execution had been issued and a receiver of his property could be appointed. [9]

Notwithstanding a judgment in an action for assault is against two or

more defendants, the plaintiff has a legal right to collect it out of the separate property of either. [3]

It is only where it is desired to collect a judgment against two or more defendants out of the joint property of all defendants, or where some provision in the judgment requires it, that the sheriff must be directed in the body of an execution to levy upon the joint property of all. [2]

Although it has been the practice in issuing an execution against the property of one of two or more joint judgment debtors to issue it in form, against the property of all, and give instructions upon the back of the execution as to what property it shall be collected from, this formality is not required by any section of the Code of Civil Procedure or by the decision of any court, nor is it necessary for the protection of any party to the judgment; and it is not error to depart from that practice and issue an execution in form against the property of the person alone from whom it is sought to collect the execution. [5, 8, 9]

The party in whose favor process issues may give such instructions to the sheriff as will not only excuse him from his general duty but bind him; both the process and the law which conveys authority under it are of benefit for the party in whose behalf it is issued, and it is a general rule that a man may dispense with an entire law which is intended to benefit him. [4]

Root *v.* Wagner (30 *N. Y.* 9); following [4] Whitman *v.* James (10 *Daly*, 490); [6] Farmer's and Mechanic's National Bank *v.* Crane, (15 *Abb. N. S.* 434); [7] distinguished.

Decided January, 1888.)

Application by plaintiff and judgment creditor for the appointment of a receiver of the judgment debtor's property.

The facts appear in the opinion.

Jenkins & Devereaux, for judgment creditor and motion.

Joseph Beale, for judgment debtor, opposed.

Kennedy, J.—On the return of the evidence taken in supplementary proceedings against the defendant Wiles upon the judgment in this action, the plaintiff made a

motion for the appointment of a receiver of the property of the said Wiles. The defendant Wiles, on the return of the order in supplementary proceedings, raised the objection that the execution issued by the plaintiff, preliminary to the order for his examination, was illegal and void, for the reason that the judgment was a joint judgment against both defendants for a single sum of money; that there was no separate liability, and that the execution was issued against defendant Wiles alone. The same objections were made to the appointment of a receiver. The facts pertaining to the proceedings thereunder are as follows: On the 10th day of January, 1887, the plaintiff recovered a judgment of $287.79 against the defendants for an assault and battery committed upon him. The defendant Stoddart had property out of which the entire judgment could be collected, but Wiles had nothing which could be reached save by supplementary proceedings and the appointment of a receiver. The plaintiff, desiring to relieve Stoddard from paying the full amount of the judgment, issued an execution in the usual form upon a money demand, except that it commanded the sheriff to collect the judgment from Wiles alone; his reason for issuing it in this form being, that if he issued it against both defendants in the usual form the sheriff could not return the execution unsatisfied by reason of the financial ability of Stoddard to pay it on demand, and hence, Wiles would escape paying any portion of the judgment.

[1] While the plaintiff could have accomplished what he desired by issuing an execution against both defendants, and then, by written instructions on the back thereof, directed the sheriff to levy and collect the entire judgment of Wiles, we do not think the execution was irregular or void, because in the body of it the sheriff was not commanded to levy and collect the judgment of both defendants. The objection to the validity of the execution is based upon the practice of attorneys rather than upon any rule of the courts or of any statute to which

our attention has been called. We can think of no reason why the direction to the sheriff may not as appropriately be in the body of the execution as upon the outside thereof. The Code is silent on this subject. None of its provisions, indeed, require that an execution must be issued against all the defendants, and it nowhere requires that the sheriff must, in the body of the execution, be commanded to enforce the judgment against all the defendants. It is only where it is desired to collect the [2] judgment out of the joint property of all the defendants, or where some provision in the judgment itself requires it, that the sheriff must be directed to levy upon the joint property of all. Notwithstanding the fact [3] that the judgment is against two or more defendants, the plaintiff has the legal right to collect it out of the separate property of either.

In Root *v.* Wagner (30 *N. Y.* 9) Judge Davis says: [4] "The party in whose favor process issues, may give such instructions to the sheriff as will not only excuse him from his general duty, but bind him. Both the process and the law which convey authority under it, are for the benefit of the party in whose behalf it is issued, and it is a general rule that a man may dispense with an entire law which is intended for his aid and protection. It follows that he may qualify it, to a greater or less extent, according to his discretion."

The direction to the sheriff as to the manner in which he shall discharge his duty forms no part of the judgment upon an ordinary money demand. It contains no instructions that any portion of it may or must be collected of either defendant, nor does it direct that it must be collected of both. It simply adjudges and decrees that the plaintiff recover of the defendants a certain sum and leaves to the party issuing the execution the right and the duty of giving such instructions as to its collection as the law approves, subject to the control of the court. It is the pleadings and the facts proven under the pleadings

which determines the character of the execution to be issued. The law prescribes what facts the execution must contain, and having done this, it further provides that it must substantially require the sheriff to satisfy the judgment out of the personal property of the judgment debtor, except in a case where special provision is otherwise made by law. Only this, and nothing more.

The question raised by the defendant relates simply to the manner in which the sheriff shall be required to [°] collect the judgment. We are aware that it would have been more in conformity to precedent and practice for the plaintiff to have directed the sheriff to collect the judgment of both defendants and then to have qualified that instruction by directing the sheriff not to do as he had been commanded in the body of the execution, but to enforce it against Wiles alone. But suppose he had done so; this would have left the execution in precisely the same condition as it now is, so far as its legal effect and direction to the sheriff are concerned. No statute requires that the directions to the sheriff must be in any precise form or upon any particular part of the execution. So long as the plaintiff only desired to collect, if possible, from the separate personal property of Wiles, what necessity was there or what use could it be to command the sheriff to collect of Stoddart also, and then immediately revoke such instructions? Such a useless formality is demanded by no section of the Code nor required by the decision of any court, nor can it be necessary for the protection of any party to the judgment. No such indirection is necessary in the enforcement of judicial decrees. While it may be easier and probably much safer for attorneys to follow a long established custom or practice than to disregard it, still, it cannot be error when it can be safely done, to depart from precedents adapted to other and older modes of practice, and conform to the letter and spirit of our present Code. It is always a pleasure, often a duty, and sometimes a necessity to quench our thirst at

the fountains of the past, but the wells of to-day are round about us, and from them we may safely drink.

[6] In Whitman *v.* James (10 *Daly*, 490*), a judgment had been recovered against joint debtors. An order of arrest had been issued but had only been served upon one of the defendants. A property execution had been issued against both and returned unsatisfied. A body execution was then issued against the one who had been served with an order of arrest. A motion to vacate the execution was made because, among other grounds, it was not issued in form against both. Judge Daly says, in deciding the motion, that "the cases holding that where one defendant only is to be taken in execution the execution must be issued against all the defendants with an indorsement directing the sheriff to take that particular defendant only, are cases in which all the defendants were originally liable to execution against the person. I find no authority for holding that, where one defendant only is liable to be taken in execution against the person because an order of arrest was granted and executed against him only, such execution must run in form against all the defendants in the action. Such execution would not be warranted by the judgment, and it is not essential to the validity of the process that it should."

This decision, and Farmers' and Mechanics' National Bank *v.* Crane (15 *Abb. Pr. N. S.* 434), are cited in [7] support of the defendants' position, but it will be seen that both were cases where body execution had been issued, in which, perhaps, the rule contended for might be appropriate, and possibly necessary, although we cannot see that such would be the case.

But the respective rights of the defendants upon an execution against the person, are not involved here. The question upon this motion is as to an execution issued to be enforced against the separate property of one of the de-

* This decision affirms s. c., 1 *N. Y. Civ. Pro.* 235; and is affirmed 89 N. Y. 635.

fendants. The right to do so is undenied, and a [8] process bearing upon its face appropriate directions for the accomplishment of the object sought to be obtained, is alone questioned. Plain, consistent directions were given the sheriff in the body of the execution for the performance of his duty; it is because these instructions were not inconsistent that they are questioned. The execution in this action describes the judgment with accuracy, alleges the liability of both defendants, and the only defect complained of is that the plaintiff directed the sheriff n the body of the execution to collect it wholly of Wiles. It was founded upon the judgment, it followed it in all respects, was warranted by it and was in the name of the plaintiff and in form against both defendants, to that point in the execution where the sheriff is directed what to do. Up to this point it was in form against both and was a valid execution against them. All that the plaintiff thereafter did was to stay the sheriff from enforcing it against Stoddard by giving positive directions to collect the judgment from the separate property of Wiles. The command to the sheriff was one which the plaintiff had the legal right to give and which the sheriff had no right to disobey. To the plaintiff the sheriff had the right to look for instructions and he found them in an appropriate place upon the face of the process he was required to execute. To have directed the sheriff to satisfy the judgment from the property of both defendants on the face of the execution, and in the same breath and with the same pen and ink immediately written on the outside thereof, equally as positive and binding instructions to the sheriff forbidding him not to do as he had been commanded within but to collect the judgment exclusively from Wiles, would have been useless and unnecessary acts, because when the execution and indorsement were read together the sheriff would have received precisely the same directions as he did in the execution as now written. The right to qualify the directions to the sheriff in an exe-

cution is asserted in Root *v.* Wagner, above cited, and the doctrine established that the plaintiff has the legal right to direct the sheriff to collect a judgment of any one or more of several defendants unless forbidden by some provision of the judgment itself. As the Code has nowhere prescribed the manner in which this shall be done, but has left it to the discretion of the party issuing [9] the execution, our conclusion is that the execution in this action was not irregular or void, and that the motion must be granted.

KERWIN *v.* VALENTINE, AS ADMINISTRATRIX, ETC.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, JANUARY, 1888.

§ 977.

Clerk's fee on filing note of issue—When payment required—Return of.

The provision of the Code of Procedure (§ 256) as amended by Laws of 1876, chapter 431, section 9,—providing for the payment of a fee of $3 to the clerk upon the filing of a note of issue in the supreme court in the first judicial district, and in the superior court of the city of New York and in the New York court of common pleas to be paid by the clerk to the comptroller and used as a fund for the payment of the salaries of stenographers,—has not been repealed, but is still in force. The repealing act of 1877, chapter 417, repealed certain provisions of the Code of Procedure then in force, excepting, however, those provisions in section 256 which were not inconsistent with or superseded by Laws of 1876, chapter 448; and the provision of the said section authorizing the collection of said fee is not inconsistent with any provision of said law of 1876.

Repeals by implication are not favored, and special and local laws are not repealed by general legislation except on the clearest manifestation of legislative intent.

There is no provision of law authorizing the repayment and return to

one paying them, of the stenographers' fees paid in the first judicial department, upon the filing of a note of issue, and as the clerk of the court is required to pay them to the comptroller of the city of New York and they are in such comptroller's constructive possession so soon as they reached the hands of the clerk, their repayment cannot be required.

McGivern *v.* Lummis (*Daily Reg.*, Dec. 24, 1877), followed, and quoted at length.

(*Decided January* 24, 1888.)

Motion by plaintiff for the return to her by the clerk of the superior court of the city of New York of the stenographer's fees of $3 paid upon the filing the note of issue in this action.

The opinion states the facts.

V. Wright Kingsley, for plaintiff and motion.

Henry R. Beekman, counsel to the corporation, opposed.

O'Gorman, J.—The plaintiff, on filing her note of issue, in compliance with section 977 of the Code of Civil Procedure, paid to the clerk of this court $3, on his demand, and as a condition precedent to the filing.

Before the case could have been tried, it was compromised and settled by the parties, and discontinued, without costs.

The plaintiff now demands that the clerk return to her this money so paid, and asks this court to make an order that such repayment be made.

It appears that the clerk has paid the money over to the comptroller of the city of New York, according to what he believed to be his duty, and the correct practice in the first judicial district.

The learned counsel to the corporation, not taking any exception to the form of the motion, appeared in oppo-

sition and contends that the plaintiff's demand should not be sustained.

This claim was raised in 1879, and discussed on motion before the general term of the marine court. The following opinion was delivered:

"Decision in reference to returning fees paid on filing notes of issue in cases discontinued before trial.

"McGivern *against* Lummis.

"By the Court.—Fees paid upon filing notes of issue are, as soon as they reach the hands of the clerk, in the constructive possession of the city of New York, and it is made the sworn duty of the clerk to pay them, with other lawful fees collected by virtue of his office, into the city treasury. The statute requiring the payment of these fees in advance contains no authority for their return in case of the discontinuance of the action before actual trial.

"The present *ex parte* application was made to the special term judge, and was by him referred to the general term, to the end that some uniform rule of practice in respect to such motions be declared for the future guidance of the clerk and the bar. It is sufficient for us to say that we find no warrant in law for such application, and therefore declare the above rule. Motion denied." (*Daily Register*, December 24, 1879.)

I see no reason to doubt the correctness of that opinion.

The contention of the plaintiff now seems to be:

First. That no legal authority now exists for the collection by the clerk of this fee on filing note of issue, the provision of law by which it was, at one time, sustained, having been repealed.

Second. That even if legal authority for demand of this fee still existed, the money paid should be refunded, in case the action was not brought to trial by reason of discontinuance by consent.

As to the second proposition, I can find no lawful

authority for the refunding of this fee, when paid over to the comptroller in compliance with law, and this court has no power to order it to be refunded.

As to the first proposition, the question deserves consideration, whether the provision of law authorizing the demand of such fee has not been repealed.

The claim of authority for imposition of this fee rests on section 256 of the Code of Procedure of 1848 (Laws of 1848, chap. 379) as amended by Laws of 1876, chap. 431, § 9; going to constitute the Code of Civil Procedure now in force.

This section of the old Code of Procedure reads as follows:

"And in every action of either of the said courts [of the first judicial district] . . . the party who shall first file a note of issue shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars, and the amount so received shall be accounted for under oath, and paid over monthly by the clerk to the comptroller, to be used as a fund for the payment of the salaries of the stenographers."

Unless that section be repealed by the general repeal contained in section 4, chapter 417, Laws of 1877, the former provision for payment of the fee is still in force.

The effect of the latter section is to repeal certain of the provisions of the old Code of Procedure then in force; excepting, however, those provisions in said section 256 which were not inconsistent with, or superseded by, the act, chapter 448 of the Laws of 1876.

I do not see that there is any necessary inconsistency between the provision authorizing the collection of this fee and the provisions of the last named chapter and section of the Laws of 1876, or that the former provision was superseded by the latter. There is no necessary repugnancy between them. Repeals by implication are not favored (People *v.* Palmer, 52 *N. Y.* 83, 88); and special and local laws are not repealed by general legis-

lation, except on the clearest manifestation of the legislative intent (*Re* Evergreens, 47 *N. Y.* 216, 220, *Re* Central Park, 50 *N. Y.* 493, 497; People *v.* Quigg, 59 *N. Y.* 83, 88; McKenna *v.* Edmonstone, 91 *N. Y.* 231, 233).

The plaintiff's motion must be denied, but, as its purpose appears to be a commendable desire to ascertain the proper practice under the law as to payment of the fee in question, it is denied without costs.

BURNETT, Judgment Creditor, *v.* RIKER, Judgment Debtor.

Supreme Court, First Department, New York County, Special Term, December, 1887.

§§ 648, 655, 2441, 2446.

Attachment—When covers money growing due under contract—Power of court to direct payment in proceedings in aid of execution.

Where the interest of a defendant in a contract made by him with a religious corporation, under which he was to furnish materials and render services for the corporation, and for which he was to be paid by them a stated amount at specific times as the work progressed was attached, and after the service of the attachment the corporation paid to the contractor more than sufficient to pay the plaintiff's claim out of moneys asserted to have been earned subsequent to such service, and thereafter, said corporation received notice of an assignment alleged to have been made five days after the service of the attachment, and the corporation also, after the notice of the assignment, paid moneys growing due under the contract to the assignee,—*Held*, that the court had the right to make an order under § 2446 of the Code of Civil Procedure directing the payment to the sheriff, out of the moneys due under the contract, of the amount of judgment, interest and sheriff's fees; that, as it did not appear that the corporation had either actual or constructive notice of the

alleged rights of the assignee at the time the payments were made to the contractor, after the service of the attachment, it would be protected against any claim which might be made by the assignee.

(*Decided December* 27, 1887.)

Motion by plaintiff and judgment creditor in proceedings in aid of execution that the St. George Episcopal Church, of Brooklyn, pay to the sheriff of Kings county, the amount of an execution issued on the judgment recovered herein against the judgment debtor, George Riker, or that, in default thereof, its officers personally served with the attachment herein, be committed for contempt.

This is a proceeding in aid of execution brought upon a judgment recovered by default in an action wherein the judgment creditor was plaintiff and the judgment debtor defendant, in which an attachment was issued on the ground that the defendant was a non-resident. Personal service of the summons was made on the defendant Riker on August 24, 1887, and the attachment was served on one of the officers—a vestryman—of St. George Protestant Episcopal Church, of Brooklyn, a religious corporation organized under the laws of the State of New York, on September 16, 1887, and on the treasurer, who was also a vestryman of said corporation, on October 10, 1885. Said corporation had contracted with the defendant George Riker for the doing by him of certain carpentering work and the furnishing of materials upon a new church building then in course of erection, for which it was to pay him the sum of $12,500 in stated amounts at specific times as the work progressed, and the plaintiff sought by the service of the attachment papers upon the officers of said corporation to attach the defendant's interest in said contract. After the service of said papers on the vestrymen of said corporation on September 16, 1887, its treasurer made three payments to the defendant on account of said contract, as follows:

September 30, 1887, $75; October 3, 1887, $500; October 8, 1887, $400. On October 15, 1887, the treasurer of said corporation received notice dated October 10, 1887, of an assignment of the defendant's interest in said contract to one James L. Riker, his son. On September 21, 1887, and thereafter, the treasurer of the said corporation made payments under said contract to said assignee. After the recovery of judgment and the issuing of execution thereon, the plaintiff and judgment creditor instituted proceedings in aid of execution, and made this motion therein.

On the motion, the corporation's attorney claimed that this was not the proper remedy; that the sheriff should have brought an action under section 655 of the Code of Civil Procedure, and that in any event the three particular payments admitted to have been made by the corporation to defendant, were moneys earned by him under the contract *after* the service of the attachment papers, and the actual assignment.

Plaintiff's attorney insisted that under section 648 of the Code, the attachment covered all money *due and to grow due* under said contract; that he should not be subjected to the costs and delay of an action, when a remedy by motion was authorized under section 2441 of the Code, and that the court had the power to grant the order asked for, under section 2446.

Henry C. De Witt, for plaintiff and motion.

Was a proper levy under the attachment made? The property levied upon was a debt due by St. George's Church to defendant, being a part of his interest under a contract made by him with it, by which he was to receive a large sum of money. (A.) Said church is a religious corporation organized and existing under the laws of the State of New York, which provide, that certain persons may incorporate, by electing two church-wardens and

eight vestrymen . . . and that the church-wardens and vestrymen so elected, and their successors, with the rector, if there be one, shall form a vestry, and be trustees of such church, and form a body corporate. *Rev. Stat.* chap. XVIII. tit. 6, art. 1, § 1. (B.) The Code of Civil Procedure provides for a levy upon a cause of action arising upon contract. § 648. It also provides in section 649 how property is to be attached, and under subdivision 3, which relates to the description of property sought to be attached herein (*i.e.*, personal property incapable of manual delivery), by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a "demand," with the person against whom it exists. (C.) § 431, subdivision 3, of the Code provides that service of a summons on a defendant, being a domestic corporation, be made by delivering a copy to the president or other head, the secretary or clerk, treasurer, or a director or managing agent. And there being no provision in the Code as to the service of a warrant of attachment on a domestic corporation, except in the case of a claim for an interest or share in the stock of the association or profits thereof, it must be assumed that service of a warrant of attachment on any proper officer of such corporation is sufficient. In the present case, both services of the warrant of attachment and notice were made on vestrymen of St. George's Church, and as such, trustees (or directors) thereof by virtue of the statute cited. The notice was in itself sufficient, as it specified the attachment of all moneys due the defendant in the possession or under the control of the corporation; not, as the officers served seemed to have assumed, under their personal control.

They were served with the warrant, &c., herein only as officers of the corporation; and, being intelligent men, must have known that they were so served (See Bills *v.* National Park Bank, 89 *N. Y.* 350: S. C., modified *sub nom.* Gibson *v.* National Park Bank, 98 *Id.* 87).

This proceeding is a proper one. The corporation is bound by the acts of its officers. Money due by St. George's corporation to the defendant herein, more than sufficient to pay the judgment recovered, was properly attached while under its control (See O'Brien *v.* Mech. & Traders' Fire Ins. Co., 50, *N. Y.* 128). These officials have seen fit to pay the money so attached, to the defendant, in defiance of the mandate of the court, and have thereby brought themselves into contempt.

And being in that position the court has inherent power to order the money attached in the hands of the corporation, or so much thereof as may be sufficient to satisfy the judgment recovered herein, to be paid to the sheriff; as well as to punish such of its officials as have disobeyed the court's order.

George C. Blake, for St. George's Church, opposed.

Lawrence, J.—The attachment was served on the 16th of September—long before any notice was given by the assignee that he had any claim, and five days before the assignment is alleged to have been made.

Notwithstanding the attachment, the treasurer of the church paid, on September 30, $75; on October 3, $500, and on October 8, $500.

Notice of the alleged assignment was not served on the officers of the church until October 10, although the letter containing the notice is dated on the 3d.

I think I have the right to make this order under section 2446 of the Code; and as it does not appear that the officers of the church had either actual or constructive notice of the alleged rights of the assignee at the time when they made the payments to the contractor, after service of the attachment, they will be protected by the order against any claim which may be made by the assignee.

If this view is correct, it is unnecessary to consider

the motion to punish the officers of the church for contempt.

The order to be entered on this decision will be settled on notice.

SWIFT, AS EXECUTOR, ETC., APPELLANT, *v.* WHEELER, RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM, DECEMBER, 1887.

§§ 3268, 3269, 3271.

Security for costs—When application for should be made upon motion.

An application to require a plaintiff to give security for costs under section 3271 of the Code of Civil Procedure can only be made upon notice to the plaintiff, and an order therefor made without notice is irregular and should be set aside.

It seems, that an order requiring security for costs under sections 3268, 3269 of the Code of Civil Procedure may be made *ex parte.*

Where an order to show cause why an order requiring security for costs should not be vacated recited that it appeared to the court that such order "was made without any notice to the plaintiff of the application therefor, and that there is no sufficient grounds for requiring the plaintiff to give security as therein required,"—*Held,* that it sufficiently specified the irregularity for which it was sought to vacate the order requiring security, viz., the non-service of notice of the motion therefor.

(*Decided December* 30, 1887.)

Appeal from an order of the Monroe county special term denying a motion to vacate an order requiring the plaintiff to give security for costs.

The action was brought by plaintiff as executrix, etc., of Mary E. Sawtelle, deceased, against the defendants to

recover $135, the alleged value of certain diamond jewelry claimed to have been taken by Charles Bell after the death of the testatrix, and pawned to the defendants. The answer of the defendant Wheeler was a general denial. Upon affidavits showing the insolveney of the estate, and the inability of the defendant Wheeler to collect a judgment for costs which he might obtain herein, the county court of Monroe, *ex parte*, on April 20, 1887, made an order under Code Civ. Pro. § 3271, requiring the plaintiff to give security for costs, and staying all proceedings on her part except to review or vacate the order, until the payment or filing and notice thereof, and the allowance of the undertaking, if any should be given. Said order and affidavit were served upon the plaintiff's attorney on April 20, 1887. The plaintiff thereafter, upon affidavits, moved to set aside said order requiring security for costs.

This motion was made upon an order to show cause, which recited that it appeared "to the court that an order made herein by this court April 20, 1887, was made without any notice to the plaintiff of the application therefor, and that there is no sufficient ground for requiring the plaintiff to give security as therein required." The motion was opposed upon the merits by said defendant Wheeler, upon affidavits in addition to these upon which the order requiring security was founded. From that order plaintiff took this appeal.

Waldo G. Morse, for plaintiff-appellant.

The order requiring security for costs was improperly made without notice to the plaintiff. The application for such an order must be to the court. *Code Civ. Pro.* § 3272. An application for an order is a motion. *Code Civ. Pro.* § 768. A motion shall be brought before the court on notice. *Rule* 37, *Gen. Rules Practice.* The only exceptions are orders to which the applicant is entitled of right, when the facts are made to appear. Is-

nard *v.* Cazeaux, 1 *Paige Ch.* 39. Applications under sections 3268 and 3269 of the Code of Civil Procedure are such exceptions, and the order is a matter of right, while an application under section 3271 is addressed to the discretion of the court, and must be governed by the general rule requiring notice. Healey *v.* Twenty-third St. R. R. Co., 1 *N. Y. Civ. Pro.* 15; Tolman *v.* S. B. & N. Y. R. R. Co., 92 *N. Y.* 359. It is unquestionable that under the old practice an order like the present would be made only upon notice of motion. 2 *Wait Pr.* 573; Cadwell *v.* Manning, 15 *Abb. Pr.* 271; Champlin *v.* Pierce, 3 *Wend.* 445; Blanchard *v.* Nessle, 6 *Hill*, 256. It is absurd to hold that the Code of Civil Procedure compels a change in this respect. If there be no notice required, and no difference made between the right given in one class of cases and the discretion given the court in the other, why should the application in the latter case be made to the court, and why the labored division of cases under one or the other head? Why is the court given discretion, if that discretion be coerced, and the "must" applicable to the one class as well as the other? I have been unable to find in the books a case under section 3271 which fails to show an application upon notice. Notice has, since the adoption of the Code of Civil Procedure, often been decided essential in applications for the exercise of discretion in requiring security. Buckley *v.* Gutta Percha Mfg. Co., 3 *N. Y. Civ. Pro.* 428, 432; affirmed, 93 *N. Y.* 637; McDonals *v.* Peet, 7 *Id.* 200.

The learned special county judge says that the case of Robertson *v.* Barnum, 29 *Hun*, 657, disposes of this question. I submit that the case referred to does nothing of the kind, but instead, holds that as the order granted in that case was one to which the moving party was of right entitled, therefore, and therefore only, was it properly made *ex parte*. In the case at bar, the order made was not one to which the defendant was entitled of right

or at all, but one which the court might make in its discretion. The order being made *ex parte*, and being irregular, should be set aside on motion.

The plaintiff should not, in a case like this, be compelled to give security. No sufficient cause appears. 2 *Wait Pr.* 568: Ryan *v.* Potter, 4 *N. Y. Civ. Pro.* 80; Carney *v.* Barnheimar, *Id.* 233 *note;* McEntee *v.* McEntee, 4 *N. Y. Month. Law. Bul.* 20; 2 *N. Y. Civ. Pro.* 94 *note.* Security is required on account of the irresponsibility of the representative, not of the estate; and protects not the opposite party, but the trust estate. *Code Civ. Pro.* § 3271. There is no suggestion that the executrix is insolvent. No court has exercised its discretion in this matter after a hearing (see opinion), and the plaintiff desires that she be somewhere heard and quitted. The court had no jurisdiction to require security in this action. The cause of action accruing after the death of the testatrix, this suit could have been brought by the executrix individually; and the fact that she describes herself as executrix neither absolves her from costs, nor charges them upon the estate which she represents. The action is not brought in her representative capacity, within the provisions of the Code of Civil Procedure. Buckland *v.* Gallup, 105 *N. Y.* 453.

Ivan Powers, for defendant-respondent.

The order requiring security was properly granted *ex parte. Code Civ. Pro.* §§ 3271, 3272; Robertson *v.* Barnum, 29 *Hun*, 658. Section 3271 permits the court, in its discretion, to require the plaintiff to give such security, and section 3272, after providing for the form of the order, directs that all other proceedings on the part of the plaintiff, except to review or vacate the order, shall be stayed, until the payment, or filing, or notice thereof, and if an undertaking be given, then until the allowance of the same. The court might have required notice of the application for the order to be given to the plaintiff,

but it was not compelled to do so. The language of section 3272, *supra*, that all proceedings on the part of the plaintiff shall be stayed, except to review or vacate the order, clearly indicates that the order can be an *ex parte* one; for if notice of the application for it was required to be given, the words "except to review or vacate" would be superfluous. The cases cited by the plaintiff have no application here, as they are under the statutes of different language; and furthermore, they must be deemed to be overruled by said modern case of Robertson *v.* Barnum, *supra.* The order requiring security for costs was properly granted upon the merits. Tolman *v.* S. B. & N. Y. R.R. Co., 92 *N. Y.* 353, 358, overruling Darby *v.* Condit, 1 *Duer*, 599, and other cases to the contrary. . . .

. The order to show cause on motion to vacate order requiring security did not specify any irregularity com plained of. *Rule* 37, *Gen. Rules Prac.* The order requiring security, being granted *ex parte*, and not upon notice, was but an irregularity (Bronson *v.* Freeman, 8 *How. Pr.* 492), which was required to be specified in the order to show cause upon said motion to vacate. Furthermore, it being discretionary with the county court to grant or withhold it, this court, upon appeal, will not review the exercise of such discretion. Myers *v.* Riley, 36 *Hun*, 20, 22, 23; aff'd by court of appeals, June, 1887, upon authority of Reilley *v.* President, &c., D. & H. C. Co., 102 *N. Y.* 383, 386; Kugelman *v.* Rhodes, 36 *Hun*, 269.

Smith, P. J.—After issue joined, the defendant, Wheeler, moved the county court, *ex parte*, for an order requiring the plaintiff to give security for costs, and thereupon an order was granted requiring the plaintiff to give security within ten days after service of a copy thereof, and staying the plaintiff's proceeding, until compliance with the order. The plaintiff thereafter moved the court,

upon an order to show cause, to vacate such order. The order to show cause recited that it appeared to the court that the first order was made without notice, and that there was no sufficient ground for requiring the plaintiff to give security as therein required. The motion to vacate was denied, and from the order denying such motion this appeal is taken.

The order requiring security for costs to be given, having been made without notice to the plaintiff, was irregular. The application for such order was made under section 3271 of the present Code,—which provides that in an action brought by or against an executor or administrator, in his representative capacity, the court may, in its discretion, require the plaintiff to give security for costs. The preceding sections, 3268 and 3269, provide that in the cases specified therein, respectively, the defendant may require security for costs to be given. Section 3272 provides that where security for costs is required to be given, the court in which the action is pending, or except in a case specified in section 3271, a judge thereof upon due proof, by affidavit, of the facts, must make an order requiring security to be given as therein provided.

The appellant's counsel is understood to contend that an application under either of the sections 3268, 3269 or 3271 may be made without notice. The respondent's counsel concedes the position in respect to motions under either of the first two sections referred to, but he contends that an applicationn under section 3271 cannot be made regularly, *ex parte*. We think the position of the respondent's counsel is correct. Under the old practice a motion for an order requiring the plaintiff to file security for costs, as provided by the Revised Statutes (2 *R. S.* 620, § 1), could only be made on notice, or, what was the same thing, on service of an order to show cause (Champlin *v.* Pierce, 3 *Wend.* 445; Blanchard *v.* Nessle, 6 *Hill* 256). The Code has not changed the practice in that respect, as to motions under section 3271. And a motion of that

nature is no exception to the general rule of the court requiring motions to be brought before the court on notice or order to show cause (*Rule* 37).

The respondent's counsel contends that the motion to vacate was properly denied because the irregularity was not specified. We think the recital in the order to show cause was a sufficient compliance with the rule in that regard. As the order requiring security for costs to be given was irregular, we do not consider the merits of the application.

The order denying the motion to vacate should be reversed with ten dollars costs and disbursements of this appeal to the appellant.

BARKER, HAIGHT and BRADLEY, JJ., concurred.

CHANNING *v.* MOORE, IMPLEADED, ETC.

CITY COURT OF NEW YORK, TRIAL TERM, JANUARY, 1888.

§ 66.

Attorney's lien—Right of set-off.

The right of set-off is a sort of natural equity that cross demands should compensate each other by deducting the less from the greater, that the difference between the two may be regarded as the debt.

Where an attorney prosecutes or defends an action under an agreement with his client that the costs to be awarded are to belong to him as his compensation for his services, the agreement is valid, and makes the attorney the owner of a judgment recovered in such action for costs, and of all security for their payment, and effectually defeats any right to set-off. which one of the sureties upon the undertaking for the payment of all costs awarded in the action might otherwise have had against the judgment creditor.

The rule in regard to set-offs is at times enlarged when necessary to prevent an injustice, but it is never extended beyond strict legal

limits when the extension will work an injustice to a plaintiff needing protection.

Where, in an action brought by an attorney to recover the amount of a judgment for costs, in favor of a client, upon an undertaking given to secure the payment of such costs, wherein the attorney claims the costs as equitably assigned under an agreement that he was to receive them for his services, the defendant, a surety, sought to have set-off a counter-claim for moneys advanced to the judgment creditor on joint partnership transactions, respecting which an accounting was pending in another court,—*Held*, that the undetermined balance can only be determined when that accounting is concluded, and cannot be anticipated by the court for the mere purpose of set-off, and that a set-off could not be allowed for that purpose.

(*Decided January* 12, 1888.)

Trial by the court without a jury.

The opinion states the facts.

Roscoe H. Channing, plaintiff in person.

Alexander Thain, for defendant.

McAdam, Ch. J.—The right of set-off is a sort of natural equity that cross demands should compensate each other by deducting the less from the greater, that the difference between the two may be regarded as the debt. The first question that arises, therefore, is, whether it is equitable (all things considered) that the set-off pleaded by the defendant Moore should be allowed against the demand in suit; and this involves two other considerations:

First. Whether the peculiar right or equity sought to be enforced ought to be satisfied by the defendant without resort to the set-off attempted. Second. Whether the set-off pleaded is entitled to be made available against the demand in suit. The action is upon an undertaking executed in an action wherein one Thomson was plaintiff and Kearney defendant. The defendants herein are the obligors on that undertaking. The condition of the undertaking is to pay all costs which might be awarded to the defendant in that action. The defendant in that ac-

tion succeeded in recovering two judgments against the plaintiff therein, which aggregate $137.07. This action is brought by the plaintiff to recover the amount of those costs. The plaintiff was the attorney for Kearney in the original action, and upon being retained he agreed with his client that the costs to be awarded in the action were to belong to the plaintiff as his compensation for services to be rendered in the defense thereof. Such an agreement is valid, made the plaintiff the owner of the judgment for costs, and of all securities for their payment, and effectually defeats any right of set-off, which the defendant Moore, as one of the sureties, might otherwise have made against Kearney, the judgment debtor (Ely *v.* Cook, 9 *Abb. Pr.* 366; aff'd 28 *N. Y.* 365; Roberts *v.* Terry, 38 *N. Y.* 107).

Second. The evidence of the defendant Moore and the interlocutory decree made in the supreme court action, wherein the defendant Moore is plaintiff and Kearney defendant, show that the claim sought to be set off is for moneys advanced to Kearney on joint and partnership transactions, respecting which an accounting is now proceeding in that court. The accounts have not been fully stated, nor has any balance been found due to either party litigant. The undetermined balance due can be determined only when that accounting is concluded, and cannot be anticipated by this court for the mere purpose of set-off, nor does it necessarily follow that the accounting when concluded will show a balance owing to the defendant Moore. The rule in regard to set-off is at times enlarged, when necessary to prevent injustice; but it is never extended beyond strict legal limits, when the extension will work injustice to a plaintiff possessing a superior equity needing protection. It follows that the set-off pleaded cannot be allowed, and that the plaintiff is entitled to judgment, with costs.

LAHEY, Appellant, *v.* KORTRIGHT, Individually and as Trustee, etc., Respondent.

Superior Court of the City of New York, General Term, December, 1887.

§§ 531–546.

Bill of particulars—When ordered in action in which title to land is claimed to be defective—Making pleading more definite and certain.

Where, in an action brought to compel the return of money paid under an agreement to purchase real property and expense incurred in and about the examining the title, on the ground that the defendant was not capable of making a good title to the premises agreed to be sold.—*Held,* that the plaintiff was properly required to furnish a bill of particulars of the defects in the title of which he complained.

In such a case, the remedy for lack of information as to what defects the plaintiff asserts in the title, is not by a motion to make his pleading more definite and certain, but by a motion for a bill of particulars.

Tilton *v.* Beecher, 59 *N. Y.,* 1871, followed and applied.

To entitle a plaintiff in an action to recover money paid as part of purchase money under an agreement for the purchase of real property and disbursements incurred in searching the title, to a recovery, he must prove that the defendant has failed to convey or offer to convey a good title to the property which she has agreed to purchase.

(*Decided December* 9, 1887.)

Appeal by plaintiff from an order requiring him to make his appeal more definite and certain by specifying the particulars in which he claims that the defendant's title to real property mentioned in the complaint is defective, and also requiring him to furnish the defendants

with a bill of particulars setting forth the specific defects claimed to exist in such title.

This action was brought by the plaintiff against the defendants individually and as trustees to recover moneys paid by the plaintiff on account of the purchase price of certain real property, and also to recover the expense of rearching the title to such property. The complaint set forth that the defendants, Gouverneur Kortright and Lawrence M. Kortright, caused to be advertised to be sold at public auction at the exchange sales rooms in the city of New York by and through the defendants Richard *v.* Harnett and Henry *v.* Donald, auctioneers, on May 25, 1887, at 12 o'clock noon, the premises numbers 430, 432, and 434 West Thirty-fourth street, in the city of New York; that on said day, at said time and place, the said premises were put up and exposed for sale at public auction, and were purchased by the plaintiff for the sum of $36,300; that, being the highest sum bidden, and this plaintiff being the highest bidder therefor, and the same was struck off to him, and the terms of sale reduced in writing and subscribed by the plaintiff and by the said auctioneers as the duly authorized agents of the defendants, Gouverneur and Lawrence M. Kortright, by which terms it was agreed that the plaintiff should, on signing the said contract, pay 10 per cent. purchase-money to the auctioneers, which should be paid to the defendants, Gouverneur and Lawrence M. Kortright, upon the return to the said auctioneers and their receipt therefor indorsed by the plaintiff, and that the plaintiff should also pay to the auctioneers his fees of $15 on each piece so sold, and the exchange fee of $3 on each piece so sold, and should pay the balance of the purchase-money on June 28, 1887, and the defendants, Gouverneur and Lawrence M. Kortright, agreed to give the plaintiff a good and indisputable title in fee simple to the premises so sold, and to convey the same in fee simple on said June 28,

1887, on receiving the said purchase-money in the manner as in said contraet provided; that in pursuance of said contract, the plaintiff paid such auctioneer said 10 per cent. on the purchase-money of said premises, amounting to $36,300, said auctioneer's fees, amounting to $45, and the exchange, amounting to $9; that thereafter the time of completing the said purchase was adjourned on mutual consent to July 6, at noon; that on said last-mentioned date, the plaintiff was ready and willing and offered to perform and fulfill the terms of contract on his part, and was prepared to make a tender of the said auctioneer's receipt for 10 per cent. of the purchase-money properly indorsed, and the balance of the purchase-money, which tender was waived by the defendants, Gouverneur and Lawrence M. Kortright, and that he demanded of said defendants a conveyance of said premises in fee simple giving him an indisputable title in fee simple, and that the defendants did not do so, and would not and could not do so, for the reason that they had not, either individually or as trustees, any right, title, power or authority, by virtue of the will and the judgment and orders of the supreme court under which they held possession of the aforesaid premises, or by reason of any matters or things; that they ever offered to convey a fee simple of said premises, or any part thereof, or to give an indisputable title thereto. or any part thereof; that the plaintiff expended $15 for disbursements in and about the examination of the title to said premises, and incurred liability in the sum of $250 for the services of his counsel in connection with the examination of said title; that he has demanded from the defendants, Harnett & Donald, the return of the 10 per cent. paid to them, and offered to indemnify them against any claim by the defendants, Gouverneur and Lawrence Kortright, and the said defendants have refused to pay said 10 per cent., or accept such indemnity or any part thereof; and that he has also demanded from the defendants, Gouverneur and Law-

rence Kortright, the return of the said 10 per cent. and the auctioneer's fees and the exchange fees, and the payment of the $15 disbursements by him in the searching of the title to said premises, and the payment of a reasonable sum for the services of his counsel in and about the searching of said title, and that said defendants have refused to make such payments or any of them. The complaint also sets forth the will and the various orders and judgments under which the defendants, Gouverneur and Lawrence M. Kortright, came in possession of the aforesaid premises and demanded judgment; that the plaintiff be relieved from the said contract of purchase; that the defendants, Harnett and Donald, be required to repay said 10 per cent. to him, and that the defendants, Gouverneur and Lawrence M. Kortright, be adjudged to pay him interest on said 10 per cent. from the time of its payment by him, said auctioneer's fees and exchange fees, aggregating $54, and the sum of $265 for his reasonable expense in examining the title to said premises, with interest from the commencement of the action, and also the costs and disbursements of the action in such proportion between them as the court may adjudge, and that the plaintiff may have such other and further relief as may be meet and equitable. The answers of the defendants, Gouverneur and Lawrence Kortright, aver the sale of the said premises to the plaintiff set forth the terms of sale stated in the complaint were not correctly stated therein, and set forth a copy of the alleged terms of sale, and the defendant claimed that they were denied; that the plaintiff was willing and ready and offered to perform and fulfill the terms of the contract to purchase, and denied that the defendants refused and were unwilling and could not perform the said contract on their part; alleged that they had performed the contract on their part; denied any knowledge or information sufficient to form a belief as to what expense of searching the title was, and that they were advised and believe and insist that said 10 per

cent. had been forfeited by the plaintiff by reason of his failure to complete the purchase, and demanded judgment:

1. That they were entitled to the said sum of $36,300 so deposited with the auctioneers as aforesaid.

2. That the auctioneers be adjudged to pay the said sum to the said defendants, but without costs.

3. That the plaintiff be adjudged to pay to the defendants legal interest on the said sum of $36,300 from July 6, 1887; and,

4. That the defendants have their costs and expenses paid by the plaintiff and for such other and further relief as may be proper.

The plaintiff served a reply to this answer, which, reiterating many of the allegations of the complaint, set forth the receipt received by him for the moneys paid to the auctioneers. After the service of the reply, the defendants moved upon affidavits for an order requiring the plaintiff to make his reply more definite and certain by specifying the particular matters or things which he alleges as a defect to the defendant's title, and on which he intends to rely at the time of the trial, and also requiring the plaintiff to furnish a bill of particulars specifying in detail each of the defects on which he intends to rely in this action, as showing defects in the defendant's title. This motion was, on November 5, 1887, granted, and this appeal thereafter taken.

James F. Malcolm, for plaintiff-appellant.

Nothing can be more clear or definite than that we base our objections to the title on the insufficiency of that will and the said court proceedings to vest in defendants a right to convey in fee simple. Now, what do they want? They want us to furnish them with the point of law (not the argument) upon which we rely to establish such inefficacy. This is not the office of a bill of particulars. Higganbottom *v.* Green, 25 *Hun*, 214, 216. Nor is it the

office of a pleading. The defendants have the same means of knowledge and information as to defects in the said will and court proceedings as the plaintiff. Indeed, they ought to have better, for they claim under them. There is no difficulty in putting on the plaintiff the burden of establishing defects. Indeed, they have done so by their answer to the complaint. For this reason, if no other, the motion should be denied. Reardon *v.* New York, etc., Card Co., 50 *N. Y. Super.* (18 J. & S.) 514. . . . . The question has been raised whether a party was obliged in the pleading or by a bill of particulars to furnish evidence, and it was decided that he was not. Drake *v.* Thayer, 5 *Rob.* 701; Gee *v.* Chase Mfg. Co., 12 *Hun*, 630.

John M. Bowers (*Platt & Bowers*, attorneys), for defendants-respondents.

The order is not appealable. . . . . Geis *v.* Loew, 15 *Abb. Pr., N. S.* 94; . . . Hughes *v.* Chicago, etc., R. R. Co., 45 *N. Y. Super.* (13 *J. & S.*), 114.

The motion to make the reply more definite and certain was properly granted. Section 546 of the *Code of Civ. Pro.* gives the court power to order a pleading to be made more definite and certain "where one or more denials or allegations contained in 'it' are so indefinite or uncertain that the precise meaning or application thereof is not apparent." This is a case where by reason of "uncertainty," the "precise application" of many of the allegations of the reply are not apparent. The scope of this section is much broader than that of section 160 of the Code of Procedure. The latter was limited to cases where the "nature" of the action was uncertain, and the cases under that Code limit the application of that section to such cases. The present section in terms applies to cases like the one at bar. "*Notes to Throop's Code*," § 531. The object of the section is to apprise a party of the matters for which he is to be put on trial with

greater particularity than is afforded by the pleading objected to, and it is applied to all descriptions of actions. It was not error to grant it in conjunction with a bill of particulars, as they apply to different pleadings and serve different purposes. The object of the bill of particulars was to apprise the defendant of matters connected with the complaint with greater particularity than was required by the rules of pleading. The object of the motion to make the reply more definite and certain was to make it conform to the rules of pleading and so apprise the defendants of the application of certain allegations contained in it. The benefit of both sections could be concurrently obtained with a view to define the issues and prevent surprise upon the trial.

The defendants are entitled to the bill of particulars, as ordered. The power of the court to order a bill of particulars extends to all descriptions of actions. Dwight *v.* Germania Life Ins. Co., 84 *N. Y.* 493; . . . Tilton *v.* Beecher, 59 *Id.* 176, and cases there cited; Doe *v.* Phillips, 6 *T. R.* 596; . . . Peters *v.* Link, 2 *Abb. N. C.* 419.

Per Curiam. (Sedgwick, Ch. J., Ingraham & Freidman, JJ.—Section 531 of the Code provides that the court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party.

Tilton *v.* Beecher (59 *N. Y.* 187) states the rule "That in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge that he is expected to meet, the court has authority to compel the adverse party to specify those particulars so far as in his power."

To entitle plaintiff to recover in this action he must prove that the defendant has failed to convey or offer to convey a good title to the property which the plaintiff offered to purchase (Bayliss *v.* Stimson, 53 *N. Y. Super. Ct.*, 233).

The charge that defendant will be called to meet is that the title that he offered to convey was not a good title to the premises, and we are satisfied that it is necessary to a fair trial of the action that plaintiff should be apprised beforehand of the specific defects in the title. Without such knowledge, defendant may be surprised on the trial by the presentation of a defect which is not apparent, but which it is possible may be met or removed. If there is no substantial defect, plaintiff cannot be injured by being compelled to specify such defect.

The order appealed from, however, in addition to requiring a bill of particulars, requires that the defendant make his reply more definite and certain or specify some particulars that he is required to furnish by the bill of particulars ordered. Both of these remedies are not required, and we think from the nature of the action that the more appropriate method is to require the plaintiff to furnish the bill of particulars.

The order appealed from should be modified by striking out the provision for the service of an amended reply, and, as so modified, affirmed, without costs of this appeal to either party.

GRAY ET AL. v. ROTHSCHILD.

SHERMAN ET AL. v. ROTHSCHILD.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, FEBRUARY, 1888.

§ 1021.

Demurrer—Judgment should be entered on determination of appeal.

Where a demurrer to a complaint is sustained with leave to the plaintiff to amend within ten days on payment of costs, the defendant should enter an interlocutory judgment in accordance with such

decision; the entry of an order sustaining the demurrer instead of an interlocutory judgment is irregular and no legal effect can be given such order except as a direction to enter interlocutory judgment.

Under the present Code of Civil Procedure, no appeal lies from an order sustaining a demurrer to a complaint.

(*Decided February* 13, 1888.)

Motion in each action for an order staying proceedings pending an appeal from orders entered herein, sustaining the defendant's demurrers to the plaintiff's complaint, with leave to the plaintiffs to answer over on payment of costs.

The defendant in each of these actions demurred to the complaint, and the demurrers, upon argument, were sustained at the special term with leave to the plaintiffs to amend their pleadings within ten days on payment of costs. Orders to this effect were entered and duly served, and thereafter the plaintiff in each action appealed from said orders and subsequently made this motion.

Grubner & Bard, for plaintiffs and motion.

Horwitz and Hirschfield, for defendant, opposed.

Andrews, J.—In my opinion both plaintiffs and defendant are irregular in their practice. Section 1021 of the Code provides that the decision of the court, upon the trial of a demurrer, must direct the final or interlocutory judgment to be entered thereon. When, therefore, the special term rendered its decision sustaining defendant's demurrer to the complaint, with leave to the plaintiff to amend, within ten days, on payment of costs, the defendant should have entered an interlocutory judgment in accordance with such decision (Liegeois *v.* McCracken, 22 *Hun*, 69; Dick *v.* Livingston, 41 *Hun*, 455). The entry of the orders sustaining the demurrers instead of such interlocutory judgments was irregular, and no legal

effect can be given to such orders otherwise than as directions to enter interlocutory judgments (Liegeois *v.* McCracken, *supra*, p. 71).

Whatever view is taken of the so-called orders entered by the defendants, all the authorities agree that under the present Code no appeal lies from such "orders" (Cambridge Valley Bank *v.* Lynch, 76 *N. Y.* 514; L. F. Co. *v.* L. G. F. S. Co., 16 *Hun*, 484; Garner *v.* Harmony Mills, 6 *Abb. N. C.* 22; Dick *v.* Livingston, *supra*).

The appeals taken by the plaintiffs from such orders are premature, and the motions for a stay pending such appeals must, for that reason alone, be denied, and, as defendant is also irregular in entering the orders, without costs, and with leave to renew after the entry of interlocutory judgments. The orders will be settled on notice.

TIMONEY, Respondent, *v.* HOPPOCK, Appellant.

Supreme Court, First Department, General Term, October, 1887.

§§ 539, 540, 992.

Exception—When unavailing, because not sufficiently specific—Statute of frauds.

An objection to evidence on the ground that it is not within the pleadings is of no avail, where, after it has been overruled, the party making the objection did not ask for any relief on the ground of surprise, but rested solely upon exceptions taken to the ruling admitting the evidence. [2, 3]

The purchase by a landlord from a tenant of an elevator left upon the premises when the tenant vacated them, but which the tenant was entitled to under her lease to remove, is not void, because the property exceeds $50 in value and there was no payment of any part of the consideration and no written evidence in the contract, for the reason that there was a delivery and acceptance of the property. [4]

When controversies are distinguished by diverse statements the dispositions made by juries of the undisputed facts must prevail, and it rarely happens that their findings are disturbed. [1]

(*Decided January* 23, 1888.)

Appeal by defendant from judgment in favor of the plaintiff and from order denying motion for a new trial.

The facts are stated in the opinion.

Britton Havens, for defendant-appellant.

James M. Lyddy, for plaintiff-respondent.

Brady, J.—The result of this controversy depends upon the disposition of a question of fact. The plaintiff, as assignee of Lizzie Wilson, claimed the value of certain articles of personal property connected with a passenger elevator which the latter caused to be added to her demise from the defendant. It was made and located under a written consent thereto given by the defendant which provided as follows:

"And in case I do not purchase said elevator at the termination of her lease, the said Lizzie Wilson may remove the said elevator upon her putting the premises in condition they were in prior to the putting in of said elevator and before the termination of her lease."

The elevator was not wholly paid for at the expiration of the term, and defendant bought it from the vendors [Otis Brothers] of Mrs. Wilson. A month before the expiration of the lease, the son of the defendant sought Mrs. Wilson and told her to leave upon the premises anything she wished to have, and they would do what was right; that he wanted the elevator and would do what was fair. This Mrs. Wilson testified, and further, that after the expiration of the term, which took place in May, 1884, and in October of that year, she called upon the defendant and asked her what she intended to do about the fixtures, and the defendant answered that she understood her son that she had bought the elevator and she

thought everything was paid for, but she found it was not, and she would have her son notify Otis Brothers and have it appraised and she would do whatever was fair in the matter and settle with her. The appraisement having been made and notice thereof having been received by Mrs. Wilson, she went again to see the defendant, when the latter said not only that she was perfectly satisfied with the appraisement but would have her son prepare a note which she would sign. This was in pursuance of an agreement to accept such a note in payment by the assignor. These statements thus made were to some extent denied by the defendant and her son, but not so emphatically by the latter as far as he was concerned. The evidence must be regarded as in conflict, therefore, and the question at issue to call properly for the province of a jury. We cannot say, from a perusal of the testimony, that the verdict was against the weight of evi-
[1] dence or that wrong was done. When, as is generally the case, controversies are distinguished by diverse statements, the dispositions made by juries of the disputed facts must prevail, and it rarely happens that their findings are disturbed.

It must be further said that this case presents only an issue of fact. There are no legal questions that require more than a moment's consideration. The defendant complains that the agreement as to purchase is alleged to have been made in October, 1884, after the expiration of the term and after the time had expired during which the plaintiff had the right to remove the fixtures, and therefore after they had become her property, and notwithstanding which the plaintiff was permitted to show an agreement made prior to the expiration of the demise and during the time when the right to remove existed.
[2] When the objection was made and overruled, the defendant did not ask for any relief on the ground of surprise, but rested upon the exception taken to the admissibility of the evidence.

The liberal provisions of the Code and their con-
[3] structions have destroyed the value of such an exception, and although the rule promulgated may work unjustly in some cases, the general effect is consonant with justice. Such a variance is not necessarily fatal.*

The defendant denies the authority of the son to charge her, but, assuming that to be so, she clearly ratified his acts and thus made them valid and binding.

The defendant presents also questions as to the right of the assignor as lessee to remove the adjustments necessary to make the elevator useful, and although they might have some force as abstractly considered they have none herein, for the reason that the defendant requested they should be left, promising she would do what was right, and what was right was ascertained by appraisement as we have seen.

The defendant having evidently designed to purchase the elevator it is not unreasonable to suppose that she wanted the adjustment, and the jury were doubtless influenced by that element of the case. The right of the lessee to remove the elevator and all things appertaining to it, it should be further observed, was secured by written consent of the defendant to which attention has already been called. The suggestion that the statute of frauds applies because the purchase was of property
[4] exceeding $50 in value, cannot be entertained. The property was delivered and accepted when the agreement was made, and this established the liability of the defendant.

These views are, of course, based upon the findings of the jury.

No error having been discovered, the judgment appealed from must be affirmed, with costs.†

Van Brunt, P. J., and Daniels, J., concurred.

* See *Code Civ. Pro.* §§ 539, 540.

† A motion for leave to go to the court of appeals was denied, without opinion.

Estate of FRANCES H. EMERY, Deceased.

Surrogate's Court, Kings County, February, 1888.

§ 2638.

Executor—When non-resident not granted letters testamentary without giving bond.

It is the policy of our laws that letters testamentary should not issue to a non-resident unless upon giving a bond, and although it has been held that letters may issue in such a case without security they should not be so issued, for the reason that creditors and legatees to whom notice of application for letters is not provided, might be seriously affected without an opportunity to object; and this is especially so since, when letters have been granted, they cannot be revoked because of the failure to give security.

Estate of Sterling (9 *N. Y. Civ. Pro.*, 448; S. C., *sub nom.* Postley *v.* Cheyne, 4 *Dem.* 493), not followed.

(*Decided February*, 1888.)

Application by Clara J. Curtis, an executrix named in the last will and testament of the decedent above named, for letters testamentary.

The petitioner is a niece and adopted daughter of the testator, and a resident of Enfield, in the State of North Carolina. The will of the decedent was admitted to probate and letters testamentary thereon granted to Herbert M. Lloyd, one of the executors named therein, on December 12, 1887.

Herbert M. Lloyd, for petitioner.

Lott, Surr.—It is the policy, I think, of our laws that letters testamentary shall not issue to a non-resident unless upon giving a bond (*Code Civ. Pro.* § 2638). It is

claimed here that unless objection is made letters may issue without security. While there is authority for that statement (Estate of Sterling, 9 *N. Y. Civ. Pro.* 448; S. C., *sub nom.* Postley *v.* Cheyne, 4 *Dem.* 492), I think letters should not be issued in such case, for the reason that creditors and legatees to whom notice of the application for letters is not provided might be seriously affected without an opportunity to object. Especially is this so when it has been decided that the letters, having been granted, they may not be revoked because of the failure of an executor to give security (Estate of Sterling, 9 *N. Y. Civ. Pro.*, 448: S. C., *sub nom.* Postley *v.* Cheyne, 4 *Dem.* 492).

Application denied.

DUVAL *v.* BUSCH.

City Court of New York, Special Term, February, 1888.

§§ 520, 523, 542, 727, 797.

Pleading—When amended need not be verified—Service of, how made—Subscription of.

An amended complaint is not a subsequent pleading within the meaning of the Code of Civil Procedure, § 523, and need not be verified (except in certain cases) although the original complaint and the answer thereto were verified.

A pleading is properly served upon an attorney by dropping it through a slit or opening for letters in the closed door of such attorney's office into a receptacle attached to the door on the inside for receiving letters during the attorney's absence, notwithstanding it is not inclosed in a wrapper addressed to such attorney. This amounts to placing the paper in a conspicuous place in the attorney's office, such opening not being an office letter-box within the meaning of section 979 of the Code of Civil Procedure, providing for the service of papers by depositing them in the office letter-box of an attorney when his office is closed; but the letter-box there referred to is a

letter-box in a building in which the attorney has his office outside of the office.

In construing the different subdivisions of section 979 of the Code of Civil Procedure providing for service of papers upon attorneys, the same must be read and taken together.

It seems, that there can be no service of a paper upon an attorney at his residence if his office is so open as to admit of leaving a paper therein.

An amended answer is properly disregarded where it is not subscribed by the attorney serving it.

Where, after the time to amend the complaint in an action had expired, the plaintiff served an amended complaint and the defendants served an answer which, by reason of being unsubscribed was of no effect, —*Held*, that the plaintiff could not take judgment upon his amended complaint, although the answer thereto was a nullity; that the attempted amendment of the complaint was also a nullity, and the failure to plead thereto was of no consequence.

(*Decided February* 27, 1887.)

Motion by plaintiff for judgment.

The facts appear in the opinion.

William H. Mundy, for plaintiff and motion.

E. A. Monfort, for defendant, opposed.

PITSHKE, J.—Plaintiff moves for final judgment on the defendant's alleged failure to serve an amended answer.

The original pleadings were a verified complaint and a duly verified answer, served September 6, 1887. In February, 1888, plaintiff's attorney (without procuring any order allowing it) transmitted an amended complaint to the defendant's attorney herein, which was not verified. The want of verification of the same constituted no objection, however, as it was not a "subsequent pleading" within the meaning of section 523, *Code Civ. Pro.* (Hempstead *v.* Hempstead, 7 *How. Pr.* 8.)*

* A similar question arose in the case of BROWNE *v.* BROMELL (*Supreme Court, Second Department, Kings County, Special Term, November* 29, 1886.

The plaintiff in that case served a verified complaint, and the

It appeared upon this motion that, within six days after receiving such amended complaint, the defendant's attorney placed a copy of defendant's own amended answer (uninclosed in any wrapper), through a slit or opening for letters then in the closed door of the office of plaintiff's attorney, into a receptacle attached to such door on the inside for receiving letters during the attorney's absence, and that the plaintiff's attorney claimed the same was improperly served, and had returned it at once; and plaintiff now applies to the court for judgment thereon as for a default in answering.

The objection to the service is, that the copy, so left as above stated, was not enclosed in a wrapper. The Code Civ. Pro., §§ 796, 797, provides, with respect to serving papers in an action, other than process, that where the service is not through the post-office and is not made during the adverse attorney's absence from his office upon a partner or clerk therein, or person in charge thereof, the service may, between six o'clock A. M. and nine o'clock P. M., be made either by leaving the paper in a conspicuous place in such office or by depositing it (enclosed in a sealed wrapper) in such attorney's "office letter box;" and it is only where no office letter box exists and the office is not so open as to admit of leaving such paper therein, that the paper may be served and left at such attorney's residence. In construing the different subdivisions of this section 797, the same must be read and taken together; and it is plain that there can be no service at an attorney's

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defendant served a verified answer thereto. Within twenty days after the service of such answer, the plaintiff served an amended complaint, which was not verified. The defendant's attorney forthwith returned it, and the plaintiff moved to confirm its service and compel its acceptance.

Hy. Huffman Browne, plaintiff in person, for the motion.

Montague L. Marks, for defendant, opposed.

PLATT, J. (without opinion), granted the motion, with $10 costs to plaintiff to abide the event.

residence, if his office (with a letter receiver inside the door) is so open as to admit of leaving a paper therein, and then it must be left in some conspicuous spot within such office; and thence it follows that the deposit in the "office letter box" can only legally occur where such office is not so far open; and, therefore, the letter box intended in section 797 and referred to therein, is his letter box in the building, outside of the attorney's office.*

The copy pleading in question went through the slit into the attorney's office and was left in a receptacle therein, which certainly was a conspicuous place in the same, for it was there that examination would be surely made for written matter arrived during the attorney's absence, and it is the spot designated within the office for placing such matter (Livingston *v.* McIntyre, 1 *How. Pr.* 253).

This view of Code, § 797, harmonizes all parts of the section, and if the paper cannot be gotten into such office to a conspicuous place therein, it may be deposited, properly enclosed, in the attorney's letter box, at the premises, outside his office, and if there be none such, then the service can be made at the residence of such attorney.

The amended answer herein was, therefore, properly served; but, nevertheless, it was rightfully disregarded and returned by the plaintiff's attorney, inasmuch as it was no pleading in the cause on its face, for not emanating from the defendant's attorney and being unsubscribed by the latter (*Code Civ. Pro.* § 520).

This effect does, however, not entitle the plaintiff to judgment herein. His amendment of the complaint was not made as prescribed in section 542, Code Civ. Pro., but after his right to amend "of course" was lost to plaintiff; and the alteration of the original complaint by amendment could only happen by virtue of an order obtained

* See Claflin *v.* Dubois, *ante*, p. 234.

allowing it (Code Civ. Pro. § 727; Follower *v.* Laughlin, 12 *Abb. Pr.* 106). The attempted amendment of the plaintiff's complaint was simply a nullity (8 *How. Pr.* 251); and a failure to plead thereto is of no consequence (Kelly *v.* Sheehan, 76 *N. Y.* 325; Robertson *v.* Shea, 9 *Daly*, 52). It has since been returned to plaintiff's attorney as served too late, and notwithstanding the plaintiff thereupon sent it to the defendant again, by mail.

This cause, therefore, remains at issue on the original complaint and original answer; and the aforementioned amended complaint and amended answer must be stricken out and the pleadings herein thus restored to their respective original form. And under the circumstances, the plaintiff should now have leave (by order), if so advised, to put in an amended complaint on payment, within three days, of $10 motion costs unto the defendant. The motion for judgment is denied.

SKINNER *v.* TIBBITTS.

SUPREME COURT, THIRD DEPARTMENT, ——— COUNTY, SPECIAL TERM, JANUARY, 1888.

§ 2340.

Lunatic—Action by, in whose name brought—Ejectment—New trial, when refused.

An action of ejectment in which the plaintiff does not demand any equitable relief is properly brought in the name of the plaintiff, notwithstanding he is a lunatic of whose person and estate a committee has been appointed.

An action at law to recover property simply may be brought by a lunatic in his own name, and in equity actions the lunatic should be named as the party suing by his committee, except that where the

subject of the action is a debt, claim or demand transferred to the committee, as provided by the Laws of 1845, chapter 112, in respect to which matters the committee may sue in their own names; and except that under section 2340 of the Code of Civil Procedure a committee of the property of a lunatic may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made.

The word "may," in section 2340 of the Code of Civil Procedure,—authorizing the committee of the property of a lunatic to maintain in his own name, adding his official title, any action or special proceeding which the lunatic might have maintained if the appointment had not been made,—the word "may" should not be construed as "must" or "shall," but should be given its ordinary signification, which is permissory, and not mandatory.

The ordinary signification of the word "may" is permissory and not mandatory.

In construing the statutes, the courts are to presume that the legislature use words in their ordinary signification, and that signification will be computed in the words in sustaining the intention of the legislature. Where a statute directs the doing of a thing for the sake of justice or public good, the word "may" has been held to mean "shall;" but where the subject matter of the action in no wise concerns public justice or public good, but relates merely to the rights of two individuals, the court should, where the meaning and intent of the legislature is doubtful, resort to the suggestion of the subject matter or of the statute when it was passed.

In an action of ejectment, where a defendant entitled to a new trial upon the payment of costs as a matter of right, the court will not ordinarily examine into and analyze the evidence for the purpose of determining whether the verdict is against the weight of evidence, and whether a new trial should be granted on the ground, as that relief is usually granted only on the payment of costs.

There is not and cannot be a definite rule to the determination of motions for new trials upon the ground that the verdict is against the weight of evidence, but each case must depend upon its own characteristics and circumstances.

(*Decided January,* 1888.)

Motion by defendant to set aside a verdict, and also for a new trial on the ground that the verdict is contrary to the evidence.

The facts appear in the opinion.

Baldwin & Baldwin, for defendants.

Reynolds, Stanchfield & Collins, for plaintiffs.

Potter, J.—This is a motion upon the minutes of the court to set aside the verdict herein and to direct a non-suit, and, if a non-suit is refused, for a new trial. The action is ejectment to recover the possession of lands alleged to have been deeded by the plaintiff, while *non-compos mentis*, to the defendant. It was tried in 1887 at the Chemung circuit. The plaintiff had been adjudged a lunatic, and a committee of his person and estate duly appointed and qualified a year or two after the plaintiff executed the deed to the defendant, who had gone into possession under it. The ground for the motion for non-suit is that the action is brought in the name of the lunatic and not in the name of his committee. This objection was raised by the defendant upon the trial and after a short discussion and with little opportunity for an examination of the decisions or statutes upon the subject, I allowed an amendment to the effect that plaintiff, by his committee or with the approval of his committee, brought the action, etc., etc.

Upon a fuller examination of the question I am quite satisfied that the action was properly brought in the name of the lunatic and there was no occasion for the amendment. It is an action at law to recover real estate. The complaint contains only allegations proper in an action of ejectment. It does not ask to have the deed from the alleged lunatic to the defendant set aside or canceled; indeed, the complaint contains no allusion to the deed and prays for no relief in respect to it.

Neither the complaint or answer contains any allusion to the fact proved upon the trial, that the plaintiff is a lunatic and had been so adjudged, and that a committee had been duly appointed and was, at the time of the com-

mencement of the action, the service of the answer and the trial of the action, exercising his functions and duties as such committee. All the allegations of the answer save one relate to the legal title to the premises, and the exceptional one is that plaintiff has no capacity to sue or maintain this action, but no fact is alleged or reason set forth why the plaintiff may not sue or maintain this action.

The allegations of fact in the pleadings, therefore, present the simple question of the legal title, and is an action at law.

I think the authorities are uniform almost down to the passage of the act of 1845, chapter 112; the act of 1874, chapter 446, title 2, section 5, and sections 111–113 of the Code of Procedure, and section 2340 of the Code of Civil Procedure, that an action at law, especially the action of ejectment, must be brought in the name of the lunatic (Patin *v.* Schoonmaker, 24 *Hun*, 85; Tone *v.* Schermerhorn, 1 *Hill*, 97; Burnett *v.* Bookstaver, 10 *Hun*, 481).

The reason of these decisions is that the legal interest in the subject of the action was in the lunatic and not in his committee.

It is quite clear to my mind that there is nothing in the language of the act of 1854, and certainly not in the act of 1874, changing this rule, or in the least degree the reason of the rule. The subject of the action specified in the act of 1854 is: "any debt, claim or demand transferred to them," the committee.

The decision above referred to in 10 *Hun*, was made in 1877, long subsequent to the acts of 1854 and 1874, and the enactment of sections 111–113 of the Code of Procedure. Indeed, it was said by the chancellor in Gorham *v.* Gorham, 3 *Barb. Ch.* 34, cited by defendant's counsel: "The question whether a suit can be commenced in the name of the committee of a lunatic for the recovery of real estate or to establish the title to the same, or whether a suit in partition can be instituted in

the name of such committee without joining the lunatic as a party, is wholly unaffected by the act of 1845, authorizing committees to sue in their own names." The tenor of this case is that in a certain class of equity actions, the lunatic should be joined with his committee in this wise: "That the suit should be brought in the name of the lunatic stating that he sues by the committee of his estate, naming them."

It follows from these authorities that in an action at law to recover property, simply, the lunatic must sue in his own name; and in equity actions the lunatic should be named as the party suing by his committee, except where the subject of action is any debt, claim or demand, transferred to them as provided by the act of 1845; and in respect to the matters the committee may sue in their own names. The defendant's contention must, therefore, rest wholly upon section 2340 of the Code of Civil Procedure. That section is as follows: "A committee of the property appointed as prescribed in this title, may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained, if the appointment had not been made." And in this section, in order to effectually sustain the contention of the defendants, the word "may" must be construed "must" or "shall." That construction would not be the ordinary meaning of the word "may"; its ordinary signification is permissory and not mandatory (Perkins *v.* Butler, 42 *How. Pr.* 102).

In construing the statutes, the courts are to presume the legislature used words in their ordinary signification, and that signification will be imputed to the words in sustaining the intention of the legislature (Groesbeck *v.* Dunscomb, 41 *How. Pr.* 302).

The word "may" has been held to mean "shall" in a statute directing the doing of things for the sake of justice or the public good (People *ex rel.* Supervisors, etc.,

51 *N. Y.* 401, 406). The subject of this action nor the controversy in relation to it in no wise concerns public justice or the public good. It is simply a dispute about the rights of two individuals, one of whom is claimed to be a lunatic, to a farm of lands. In ascertaining the meaning and intent of a statute, where the language is doubtful, the court should resort to the situation of the subject matter of the statute when it was passed (People *v.* Schoonmaker, 63 *Barb.* 44).

We have seen that for a century, more or less, before this statute was formed, an action at law must be brought in the name of the lunatic, and that it so remained, notwithstanding the various laws passed upon the subject of actions, parties to actions, and proceedings in actions, including the provisions of the Code of Procedure upon those subjects until the year 1845.

In that year, the legislature passed an act entitled "An act in relation to the powers of receivers and committees of lunatics and habitual drunkards permitting them to sue in their own names for any debt, claim or demand transferred to them." The theory of this legislation is no doubt based upon the doctrine that the money and choses in action of the parties for whom the receiver and committee were appointed were brought into court to be connected by the court through its officer, the receiver and committee.

Then followed the statute of 1874 entitled, "An act to revise and consolidate statutes relating to the care and custody of the insane and the management of the asylums and the duties of the state commissioners. This statute simply re-enacts the statute of 1845 in terms. It would hardly be presumed that the legislature intended under the titles of these statutes and the purposes of them, to change the pleadings and parties to actions, or to divest the owner of his title to said estate and invest the same in the court or in its officers. Now these two statutes are the source or the seed from which it is

claimed the codifiers derived section 2340. That is undoubtedly so, but not the interpretation which is sought to be given it.

It seems to me, considering the language employed, the state of law upon this subject when section 2340 was was adopted, and its genesis, that section 2340 was intended to apply to the certain subjects only—viz: debts, claims and demands and not at all to the subject of real estate, —over which it has been held (in the cases hereinbefore referred to) the courts have no power except to order a sale to pay debts; and in that case the deed has to be in the name of the lunatic, and signed and sealed in his name by the committee (Matter of Krott, 11 *N. Y.* 52).

My conclusion is, that the motion for a non-suit was properly denied; what should be done in respect to the amendment, or what course the plaintiff may deem advisable is not properly before me upon this motion made by defendant.

Should the verdict of the jury be set aside as against the weight of evidence, of course, there is not and cannot be a definite rule to be applied to the determination of motions upon this ground, but each case must depend upon its own characteristics and circumstances (Kelly *v.* Frazier, 27 *Hun*, 314; Barrett *v.* Third Avenne R. R. Co., 628).

This being an action of ejectment, the defendant is entitled to a new trial upon the payment of costs. The ordinary terms of granting a new trial upon the ground that the verdict is contrary to the evidence is the payment of the costs. The defendant will probably have a new trial if he chooses to. It is hardly worth while for me to analyze and weigh the evidence of the various witnesses in this case, which I ought to do before definitely passing upon that question. If such motions are to be disposed of by the impression produced upon the mind of the court by the evidence at the trial, or from the court's recollection of the evidence, I think I was

then and am now prepared to dispose of this motion; but such, I apprehend, is not the rule. It is better and easier for the defendant to take his new trial under the statute.

Motion denied, with $10 costs.

FROST *v.* KOPP.

City Court of New York, Special Term, December, 1887.

§ 2919.

Abatement of action—Replevy in district court—Liability of sureties in undertaking.

An action abates when it is defeated or fails and the legal power to continue it has terminated.

All jurisdiction of a district court over an action commenced therein terminates on the failure of the justice to decide the case within eight days after it was finally submitted to him for decision, and in that case it abates within the legal meaniug of that term as employed in an undertaking given to replevy a chattel.

The sureties in an undertaking given to replevy a chattel in an action brought in a district court in the city of New York are liable thereon where the action abates by reason of the failure of the justice to decide the case within the statutory time. They are supposed to have contracted with reference to this contingency.

The presumption that the justice would do his duty is to be overcome, like in any other presumption by proof to the contrary to that effect.

The *ad damnum* clause of a complaint if not open to a demurrer.

(*Decided December* 8, 1887).

Demurrer to complaint.

This action was brought to recover upon an undertaking, given by the defendants as sureties upon the replevying of a piano in an action of claim and delivery brought by the defendant Pauline Kopp against the pres-

ent plaintiff in an action in the district court in the city of New York; that action was brought to recover the said piano, which was valued at $200, and the plaintiff, to secure possession thereof, gave their undertaking in which the defendants jointly and severally undertake, pursuant to the statute in such case made and provided for the prosecution of the action, in the sum of four hundred dollars, for the return of said chattel to the defendant, if possession thereof is adjudged to him, or if the action abates or is discontinued before the chattel is returned to the defendant, and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff."

Under the order made upon the giving of this undertaking, the piano claimed was seized by the city marshal and delivered to the plaintiff in that action, the defendant herein, Pauline Kopp; that action was thereafter tried before a justice of the district court in the city of New York, who reserved his decision and failed to render it within the eight days fixed by the statute for the so doing; thereafter, the defendant in the district court action brought this action and the complaint was demurred to by the defendants herein on the ground that it did not state facts sufficient to constitute a cause of action.

Joseph Steiner, for defendant and demurrer.

H. A. Brann, for plaintiff, opposed.

McAdam, Ch. J.—An action abates when it is defeated or fails and the legal power to continue it has terminated. All jurisdiction over the district court action terminated on the failure of the justice to decide the cause within eight days after it was finally submitted to him for decision (Consol. Act of 1882, § 1384; 4 *Den.* 72; 4 *E. D. Smith*, 279; 1 *Hilt.* 300; 1 *Daly*, 485; 4 *Abb. N. C.* 187). The action failed, and the power to continue it

terminated. The plaintiff did not succeed in obtaining a recovery, and in this sense she was defeated in the purpose of her action. The action, therefore, abated within the legal sense of that term as employed in the undertaking. The question is not new. It came before this court in Tone *v.* Hetherington (*Daily Reg.* October 7, 1881), and such was the interpretation then applied to similar circumstances. It was presented in the city court of Brooklyn before Judge Reynolds, in Bartsel *v.* Evarts. Judgment was directed against the sureties for the value of the property. The sureties paid the judgment, and thereafter sued the justice to recover back the moneys they were obliged to pay by reason of his failure to decide the action pending before him within the statutory time. The court of appeals held that the action against the justice was not maintainable (Evarts *v.* Kiehl, 102 *N. Y.* 296).

The defendants, however, are clearly liable. They are chargeable with a knowledge of the law, and presumably knew that if the justice failed to decide the case within the statutory time the action would abate, and they are supposed to have contracted with reference to this contingency. The liability is one which the nature of the case made possible, and this, being known to the sureties, was fairly within their contemplation when they executed the undertaking now sued upon. It may be argued that the justice being a public officer, the sureties had the right to assume that he would perform his judicial duty. They had. But as this is a mere inference, it may, like any other presumption, be overcome by proving the contrary to be the fact. The complaint alleges, that the defendant, by demurring, admits that this duty was neglected in the present instance. The presumption is thereby effectually overthrown.

The $400 claimed is the penalty of the undertaking. The damages recoverable are limited to $200, the value of the property as stated in the undertaking. As the *ad damnum* clause of the complaint is not open to demurrer

(5 *Sandf.* 640; 15 *How. Pr.* 314), it follows that the plaintiff is entitled to judgment on the demurrer, but the amount thereof will be limited to $200. Judgment accordingly.

WEILER, Respondent, *v.* NEMBACH, Appellant.

Supreme Court, First Department, General Term, January, 1888.

§§ 1535, 1536, 1638, 1686.

Action to determine claim to real property—when cannot be maintained against infant—construction of statute.

An action by one in possession of real property to compel the determination of a claim thereto adverse to him, cannot be brought or maintained against an infant.

Section 1686 of the Code of Civil Procedure, construed, and held not to remove the limitation contained in section 1636, prohibiting the bringing of an action to determine a claim to real property against an infant.

In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute, as well as from other circumstances, consequently a literal interpretation is not always to be adhered to; and where the case is brought with the intention of the makers of the statute it is within the statute, although upon a technical interpretation it is not within its letter. A reasonable construction should be adopted in all cases where there is no doubt or uncertainty in regard to the intention of the law-makers.

(*Decided January*, 1888.)

Appeal from an interlocutory judgment overruling a demurrer interposed by the defendant (an infant).

The material facts appear in the opinion.

L. C. Waehner (*Lawrence & Waehner*, attorneys), for defendant-appellant.

The bringing of an action to determine claims to real property was authorized by the Code of Procedure in force at the time the Code of Civil Procedure went into operation. Code Pro. § 449. . . . This provision simply permitted the bringing of an action instead of following the course of procedure laid down in the statute. The revised statutes at the time contained directions for bringing such proceedings by the service of a notice, and section 3 of title 2 of chapter 5 of part 3 of the Revised Statutes (2 *Edm.* 321, 322) provided: "Section 3. Such notice can be directed to and served only upon a person being at the time of full age and not insane or imprsioned on any criminal charge or conviction, and it shall be served by delivering a copy thereof personally to the individual to whom it is directed." The bringing of such a proceeding against an infant was, therefore, prohibited by the revised statutes before and during the time the Code of Procedure was in force. The provisions of the Code and revised statutes are embodied in the Code of Civil Procedure, chapters 14 to 21 inclusive, which took effect September 1, 1880. Code Civ. Pro. § 3356. Title 1 of chapter 14 deals with "actions relating to real property." Article 5 of that title refers to an action to compel the determination of claims to real property, and section 1638 of that article explicitly forbids the bringing of such an action as this against an infant . . . It may be urged that section 1686 of the Code of Civil Procedure allows such an action. . . . The Code prescribes (§ 3355): "For the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously." (a) It cannot be urged, therefore, that section 1686 derives any force as annulling or limiting section 1638 from any

consideration of its being a subsequent enactment. (b) The two sections are portions of one act, and went into effect simultaneously, as expressly declared by the legislature, and they are subject to the laws of interpretation that are customarily applied to conflicting wordings of different parts of the same act, and consequently the following rules of interpretation would apply. "The court is to give effect to every clause, section and word, if an effect can be given to it." "As the construction is to be made upon the entire instrument, whole will or complete statute, and not upon disjointed parts of it, consequently all its parts are to be compared, considered and construed with reference to each other." *Potter's Dwarris on Statutes*, 194, 197, 202, ed. 1871. Now, adopting this rule, and applying it to sections 1638 and 1686 of the Code, it is submitted that the court must give effect to both sections if it can be done reasonably; and it can be done by construing section 1686 so as to make it in effect read: "Any action specified in this title may be maintained by an infant in his own name and against an infant in his own name, excepting an action to determine claims to real property which can be maintained by, but not against, an infant in his own name, as hereinbefore declared in sections 1638, etc."

The intention of the legislature is to be sought out and given expression to, in the interpretation of statutes. It will be noted that section 1638 is full and explicit, in particular words and at large, while section 1686 is general, and has reference in broad terms to all actions affecting real property. "In construing acts of Parliament, judges are to look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive as expressions used in other parts the real intention of the legislature, it is then their duty to give effect to the large expressions. Hence, general words may be restrained; hence clauses may be controlled by

clauses." *Potter's Dwarris on Statutes*, 194, and authorities cited.

There is no doubt that where the wording of a statute is of uncertain import the intention of the law-giver must be looked for. In the light of this rule, there cannot be a doubt that the legislature did not intend to alter the settled policy of the law upon this subject by the enactment of section 1686, especially when it simultaneously re-enacted and re-declared that policy in section 1638.

As to the opinion of the learned justice in that portion of the decision where he says: "As both sections 1638 and 1686 are contained in chapter 14 of the Code, they would, under section 3355, be deemed to have been enacted simultaneously, and unless the ordinary rules of construction can be applied to them, the result must be that they would neutralize each other, there apparantly being no provision of the Code to meet a case where two sections are inconsistent and in conflict with each other." It is submitted that the dictum that "the result must be that they (meaning the two sections of the act) would neutralize each other," is opposed to the established rule of interpretation in such case, which is, in general words, that the court will not favor the repeal of statutes by implication, even when it is a question of an earlier and a later enactment ——— *v.* ———, 9 *Barb.* 260. And when both the latter and former statute can stand together both will stand, unless the former is repealed or the legislative intent to repeal it is very manifest. Again: "The object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject matter, what it has clearly said in one part must be the best evidence of what it has intended to say in another." *Potter's Dwarris on Statutes*, 197. Now, what has the legislature clearly said in one part of this statute? It has expressly prohibited the commencement of this action, and therefore the subsequent section

of the same act, being general in its character, cannot control. On the contrary, within the rule above cited, the best evidence of what the legislature intended must be found in the former section. People *ex rel.* Kingsland *v.* Palmer, 52 *N. Y.* 83; Hawkins *v.* Mayor, etc., 64 *Id.* 188. And further, the appellant submits that the fact that the portions of the revised statutes and the scattered acts from 1848 to 1864, relating to the action to determine claims to real property have been repealed, should have no weight against the defendant's position; for the truth is that those provisions of law were repealed to make the way clear for the Code of Civil Procedure, and in the Code of Civil Procedure, the entire subject of actions to determine claims to real property was revised, and the former laws on the subject were re-enacted in a fuller and more elaborate form, and the whole procedure of these actions was defined and regulated from their commencement to final judgment with great particularity. And the bringing of this action against the persons laboring under the disabilities of infancy, etc., etc., was again forbidden in express terms more fully than in the revised statutes. All these provisions are contained in one article consecutively. In that article is found again a reference to the disabilities named in section 1638, viz., in section 1647: "A person claiming as owner an estate in fee for life or for years in real property may maintain an action against a woman who claims to have a right of dower in the whole or a part of the property to compel the determination of her claim; unless she is under one of the disabilities specified in section 1638 of this act. But such an action cannot be commenced until the expiration of four months after the death of the defendant's husband." So that once again after section 1638 the legislature declares its intention to prevent the bringing of this action against those persons falling under the disabilities mentioned in section 1638. Does it not appear most conclusively that that intention was an energetic one, and that it was ad-

hered to and enforced carefully and systematically? Is it reasonable to hold that the clear meaning of these two sections, 1638 and 1647, should be repealed by implication (merely by implication) by section 1686, which bears every mark of having been hastily and carelessly drawn? The statement, in the opinion of the learned justice, that it is apparent that the legislature intended by section 1686 to nullify and render meaningless, two sections, 1638 and 1647, which, in themselves, embody the old law of this State, it is respectfully urged, is not well grounded.

John D. Townsend, for plaintiff-respondent.

The court has jurisdiction of the person of the defendant. Although, by *Code Civ. Pro.* § 1638, an infant is excepted from those against whom an action of this kind may be brought, yet such section is amended, as it were, by section 1686, which provides that such an action may be maintained by or against an infant in his own name. The provision contained in section 1638, that an infant could not be sued in such an action as this, existed before the Code of Civil Procedure passed the legislature in 1880, while the provision in section 1686 was never a law before, and first appeared when chapter 1 of the Code was enacted in 1880, and has been marked "new" by the annotators of the Code ever since. Although it is provided that for the purpose of determining the effect of the different provisions of the Code with respect to each other, they are deemed to have been enacted simultaneously (section 3355), yet, in a question of this kind, it cannot be ignored that section 1686, as against section 1638, expresses a later intention of the legislature. Where the provisions of two statutes are manifestly repugnant, the earlier enactment will be modified or repealed by the later one. Thomson *v.* Thomson, 55 *How. Pr.* 494. Passing a law inconsistent with some provision of a preexisting statute is an implied repeal of the first so far as those provisions are incompatible with each other. Bur-

dick *v.* Phillips, 17 *Weekly Dig.* 440. In construing a statute, effect must be given, if practicable, to all the language employed, and inconsistent expressions are to be harmonized, if possible, to reach the real intent of the legislature (*Exp.* New York & Brooklyn Bridge, 72 *N. Y.* 527). Section 1686 makes applicable the provisions in chapter 5, which are contained in article fourth of its second title, and it is apparent from these provisions, especially section 468, that it was the intention of the legislature that neither the rights of an infant nor the rights of any other person were to be jeopardized on account of infancy.

Van Brunt, P. J.—The defendant in this action is an infant. The suit is brought to compel the determination of a claim to real property, and it is claimed on the part of the defendant that the bringing of such an action against an infant is prohibited by section 1638 of the Code, which reads as follows:

"Section 1638. Where a person has been, or he, or those whose estate he has, have been for three years in the actual possession of real property claiming it in fee or for life or for a term of years not less than ten, he may maintain an action against any other person except a person who is, when the action is commenced, an infant, an idiot, a lunatic, an habitual drunkard or imprisoned on a criminal charge or an execution upon conviction of a criminal offense, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes to any estate in that property in fee or for life or for a term of years not less than ten in possession, reversion or remainder. But this section does not apply to a claim for dower."

This section is an attempted codification with interpolations of the provisions of the Revised Statutes upon this subject, and contains a clear and emphatic provision that actions of this nature shall not be commenced

against an infant. That was the effect of the provisions of the Revised Statutes upon the same subject; but the codifier, in attempting to improve upon these plain regulations, has introduced a section of the Code which appears to be in direct conflict with the provision referred to, so far as infants are concerned.

Section 1686, which occurs in the same title of the Code as 1638, reads as follows:

"Any action specified in this title may be maintained by or against an infant in his own name; and article fourth of title second of chapter 5 of this act applies to such an action, except as otherwise prescribed in sections 1535 and 1536 of this act."

The language of this section thus apparently permits that which in section 1638 is expressly prohibited. There being this apparently conflicting legislation upon the same subject in the same statute, it is necessary to ascertain, if possible, what the legislative intention was. It is well settled that "in the interpretation of statutes the great principle which is to control is the intention of the Legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute, as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit and purpose of the statute which have to be regarded in its interpretation, and if these find fair expression in the statute it should be so construed as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the law-makers" (People *v.* Lacombe, 99 *N. Y.* 49, and cases there cited).

"The object of all rules of construction being to as-

certain the meaning of the language used, and it being unreasonable to impute to the Legislature inconsistent intents upon the same general subject matter, what it has clearly said in one part must be the best evidence of what it is intended to say in another" (*Dwarris*, 197).

It is urged upon the part of the respondent that section 1636 indicates a plain intent to change the provision or the Revised Statutes.

The Revised Statutes prohibit the institution of these proceedings against a person not of full age or insane or imprisoned on any criminal charge or conviction. By the enactment of section 1636 the Legislature exhibited an intention not only not to restrict the prohibition contained in the Revised Statutes, but actually enlarged it by including within the prohibition idiots, and habitual drunkards, thus indicating an intention to allow this class of actions to be commenced only in those cases in which a party proceeded against was in a condition to defend herself. Having thus shown an intention to protect the helpless, did the Legislature intend by section 1686 to remove that protection from an infant, which it was so careful to provide for in section 1638, and leave an infant subject to assaults upon his property, while such protection still continued as to the drunkard and criminal?

It seems to us that the mere statement of the proposition shows that such could not have been the legislative intent, although the language would seem to so imply. No reason can be assigned for protecting the drunkard and criminal who place themselves under disabilities because of their own acts, and leaving the infant helpless because of no fault of his own without any shield whatever. It is evident that in preparing section 1636, the codifier forgot the prohibitions inserted in section 1638, which prohibitions did not inadvertently creep in by reason of their previous existence in the Revised Statutes, because, as we have seen, the provisions of the Revised Statutes are expressly enlarged in the Code, and used

the general language "any action specified in this title," &c.

There being a large number of actions to which section 1686 applies other than those mentioned in section 1636, it is evident that there was no intention to remove any person from the protection thrown around him by the Revised Statutes, but rather to extend the prohibition to classes of persons incapable of taking care of their own interests.

Certainly this conclusion is more in harmony with the rules of construction than to hold that in one part of the statute the Legislature deliberately enacted one thing, and then, in a subsequent part of the same statute, revoked the previous enactment without any apparent reason for so doing.

We are of the opinion, therefore, that the judgment appealed from should be reversed, and that the defendant should have judgment upon her demurrer, with costs of this appeal and costs of the demurrer in the court below.

FERRIS, APPELLANT, *v.* PLUMMER, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM, DECEMBER, 1887.

§§ 435, 1670, 1671.

*Lis pendens—Substituted service equivalent to personal service for the purpose of supporting.**

Substituted service of the summons in an action is equivalent to personal service within the spirit of section 1670 of the Code of Civil Procedure,—providing that where a notice of the pendency of an action is filed before the services thereof, service must be made by substi-

* See Clark *v.* Lockard, *ante*, p. 278, and cases cited in the opinion there reported.

tution or publication thereof within sixty days after such filing (PRATT, J., dissenting).

Where, in an action to foreclose a mortgage, a *lis pendens* was filed before the service of the summons, and on the sixty-first day thereafter, substituted service of the summons was made,—*Held*, that such service was in time; that it was equivalent to the personal service of the summons and rendered the filing of the *lis pendens* effectual as to subsequent lienors.

(*Decided December* 13, 1887.)

Re-argument of appeal by plaintiff from a judgment of the special term dismissing his complaint.

This action was brought to compel the defendant to specifically perform a contract for the exchange by the defendant of certain real property owned by him, for certain other real property to which the plaintiff acquired title through a deed of the sheriff of the county of Kings, upon a sale made by a sheriff under and pursuant to a judgment of foreclosure and sale entered in an action in the supreme court of Kings county, brought by one William I. Preston against William H. Algie to foreclose a mortgage for $5,000 on said property, which mortgage was dated October 18, 1884.

By the contract upon which this action was brought it is provided that the parties shall mutually "execute, acknowledge and deliver each to the other or to their assigns, . . . a proper deed or deeds for the conveying or assuring each to the other in fee simple of the property, . . . free from all incumbrances and in name or nature except as afore mentioned." The defendant refused to perform the contract, for the reason that the plaintiff did not offer a good title free from all incumbrances, etc., claiming a mortgage, a judgment and mechanic's lien filed or recorded subsequent to the date of the filing of the notice of *lis pendens* in the foreclosure action which resulted in the sale at which the plaintiff became the purchaser, were liens upon the property. The *lis pendens* in said action was filed on December 17, 1884.

On February, 11, 1885, the plaintiff in that action obtained an order from the court directing that the summons therein be served upon the defendant Algie, the mortgagor and the sole defendant therein, by substituted service and pursuant to the Code of Civil Procedure, section 435 to 437, and, on February, 12, 1885, said service was duly made as required by said sections and order. On February 16, 1885, an affidavit proving such service was duly filed in the office of the clerk of Kings county. On December 19, 1884, two days after two *lis pendens* was so filed, Algie executed a mortgage on the property for $4,000, which was recorded December 24, 1884. On January 8, 1885, a mechanic's lien on said property for $1,262.80 was docketed against Algie as owner; and on February 14, 1885, notice of the pendency of an action to foreclose such lien was duly filed with the complaint, and thereafter on August 28, judgment of foreclosure and sale in such action was duly entered, by which the sheriff was directed to expose the property in question for sale, and out of the proceeds to satisfy the claim of the plaintiff therein, amounting to $1,347.20, and apply any residue towards the judgment of another mechanic's lien amounting to $300, filed January 16, 1885. On March 22, 1885, a judgment for $138.93 was duly docketed against said Algie in Kings county.

Said mortgage, mechanic's lien and judgment remain wholly unsatisfied and are claimed by the defendant to be liens upon the property because of the fact that service of the summons in the foreclosure action brought by Preston against Algie was not made in the manner prescribed in the Code of Civil Procedure within sixty days after the filing of the *lis pendens* therein. No amendment was ever had in the foreclosure action brought by Preston against Algie, and no *lis pendens* other than the one first above mentioned was ever filed therein. On April 8, 1885, judgment of foreclosure and sale was entered in such foreclosure action, and on May 2 the sheriff's

deed was executed to the plaintiff, under which he claims title.

This action was tried at special term before Mr. Justice CULLEN, who dismissed the complaint. The plaintiff thereupon appealed to the general term, and his appeal was argued in September, 1886, and the decision of the special term was affirmed, except that the judgment of the special term was modified by striking out the award of costs made to the defendant. The opinion of the general term on the first argument is reported in 42 *Hun*, at page 440. Subsequently, a motion for re-argument was made before the general term, and, on May 9, 1887, the following decision was filed granting a re-argument.

PRATT, J.—It seems to be conceded upon the argument of this case, that the validity of the title depended upon the question of service of summons, and that was the question considered by the court. The question whether the subsequent purchaser and mortgage were not bound by the *lis pendens* and judgment was not discussed. It seems to me there is enough in it to warrant the granting of a re-argument, and I so vote.

B. F. Tracy, for plaintiff-appellant.

Jasper W. Gilbert and *William H. Hamilton* (*Booraem & Hamilton*, attorneys), for defendant-respondent.

BARNARD, P. J.—The record in the foreclosure action of Preston *v.* Algie, shows a case of complete jurisdiction over the parties for all purposes. The action was commenced on December 17, 1884, by the filing of the summons and complaint and *lis pendens* in the office of the clerk of Kings county.

On February 11, following, an order for a substituted service was obtained, and the summons was served in accordance therewith. On March 2, 1885, the defendant

appeared and answered, and the case was tried upon its merits. Judgment of foreclosure and sale was directed, and the sale was made under it, at which the plaintiff's title was acquired. Subsequent to the filing of the *lis pendens*, certain liens were put upon the property mortgaged, and the sole question is whether these liens were cut off by the judgment. It seems to me plain that they were.

By section 1671 of the Code all such lienors are bound by the proceedings subsequent to the filing of *lis pendens*, the same as if the lienors were parties to the action. The substituted service was made on February 16, 1885. It was the sixty-first day after the filing of the notice of *lis pendens*. This was in time (Gribbon *v.* Freel, 93 *N. Y.* 93).

Substituted service was equivalent to personal service within the spirit of section 1670 of the Code for the purpose of supporting the *lis pendens*. The trouble arises only from the fact that substituted service is comparatively a new mode of service, and the old sections were not all made to conform to the addition. It certainly could not be within the spirit of the law that a service which is good as to the parties, and when the court has jurisdiction of the subject matter, should not be good as against subsequent lienors.

The defendant appeared, as has been stated, and made no objection to the mode of service upon him. The service was within the time, but the name for the particular service is not contained in the section, which upholds a *lis pendens* when the summons was served within sixty days from its filing. The section meant to include two methods of service, and its only restriction was that the service be made within the limited time, so that a *lis pendens* could not be used perpetually to notify subsequent lienors without active prosecution of the action.

The judgment should be reversed and a new trial granted, costs to abide event.

Dykman, J., concurred.

PRATT, J.—[Dissenting.]—Further reflection confirms the opinion expressed upon the former hearing, that Bogart *v.* Swezey (21 *Hun*, 463), is an authority directly in point to the effect that the substituted service in Preston *v.* Algie, is not equivalent to a service by publication and will not sustain the *lis pendens.*

It is difficult to see why substituted service should not be regarded as good as service by publication; but that matter is left out of the Code in cases of attachment and foreclosure. It may have been an oversight on the part of the codifiers, and the court may have been mistaken in construing the sections. But while that decision remains uncontrolled by the determination of a higher court, we should not be warranted in requiring a purchaser to take a title against which that authority could be quoted.

The contention that the subsequent lienors are concluded by the judgment, cannot prevail, as they were not parties to the suit. If the *lis pendens* fell by reason of want of proper service, nothing will avail to cut off these incumbrances except a judgment in a suit wherein they are parties.

We are compelled to adhere to the conclusion reached upon the former argument, that the judgment of the special term should be modified by striking out the costs granted therein, and, as thus modified, affirmed, without costs.

BATES, Respondent, v. NORRIS, Appellant.

Superior Court of the City of New York, General Term, January, 1888.

§§ 1228, 3228.

Costs—Right to, where defendant serves supplemental answer, setting up payment after commencement of suit—Payment of costs on service of supplemental answer—Stipulation between attorneys—Judgment—When one entered upon, referee's report not set aside.

A judgment entered upon the report of a referee wil not be set aside on motion where it follows the report, on account of an erroneous decision of the referee; the proper mode of review in that case is by appeal.

In an action in which the complaint demands judgment for a sum of money only, the plaintiff is not entitled to costs unless he recovers $50 or more. The fact that the plaintiff's demand was greater than $50 does not entitle him to costs because the recovery was reduced to less than $50 by payments made subsequent to the commencement of the action and set up in a supplemental answer, and neither the court nor a referee before whom the case was tried has power to give the plaintiff in such case costs unless the recovery exceed $50.

A provision in a referee's report in an action wherein the complaint demands judgment for a sum of money only, that a plaintiff recovering less than $50 is entitled to costs, is void, and does not authorize the clerk of court to enter judgment for costs.

Where, after the commencement of an action, the defendant paid a part of the claim in suit and seeks to set up payment, by a supplemental answer, the plaintiff should insist upon payment of his costs in the order granting leave to serve such supplemental answer, and failing to obtain a provision entitling him to costs in such order, his right to costs depends upon the amount of his recovery.

The court cannot enforce a verbal stipulation between attorneys that payments made on account of a demand set up in the complaint in an action shall not affect the right of the plaintiff to his costs; such

stipulation, if in the action, being within the provision of rule 11 of the General Rules of Practice and not enforceable unless in writing: and if it was an agreement outside the proceedings in the action it could not affect the right to costs.

(*Decided January* 3, 1888.)

Appeal by defendant from an order denying his motion to set aside the judgment herein entered upon the report of a referee appointed to hear and determine; and also appeal by defendant from an order directing the clerk of this court to retax the plaintiff's appeal to allow him full costs.

This action was brought to recover an unpaid balance of the alleged value and agreed price of certain advertisements inserted by plaintiff for defendant in several newspapers published in the city of New York. The sum for which the complaint demanded judgment was $92.54, with interest from September 1, 1885. The answer of the defendant was a general denial. On March 21, 1887, an order was made and entered herein, referring the issues for hearing and determination, and on May 18, 1887, notice of hearing before the referee on June 2, 1887 was duly served. Thereafter, the hearing before the referee was adjourned, from time to time, until August 17, 1887, at 2 P.M. After issue joined, the defendant paid the plaintiff $100 as follows, viz., April 1, 1887, $50; June 2, 1887, $25; June 15, 1887, $25; and on August 9, 1887, after notice to plaintiff, leave was granted him to serve within twenty days a supplemental answer setting up such payments. On August 22, 1887, he served such supplemental answer. On August 17, the date to which the reference was adjourned as above stated, the plaintiff attended before the referee, but the defendant did not, and the referee, therefore, heard the plaintiff's proofs, and subsequently filed a report in which he found the facts to be as alleged in the complaint; that at the time of the commencement of the action the plaintiff was indebted to the

defendant in the sum of $92.54, with interest from September 1, 1885; that payments on account had been made by defendant after the commencement of the action, and that, after adding interest to the plaintiff's claim to the date of the payments, and deducting the payments, there was due the plaintiff at the date of the report (August 30, 1887), the sum of $1.66 with interest thereon from June 15, 1887, together with the costs of the action. On this report, the plaintiff, on September 10, 1887, entered judgment for $1.66 damages, and $85.59 costs.

Thereafter, the defendant moved upon affidavits to vacate and set aside the judgment. His motion was denied, and he appealed therefrom. The costs entered in the judgment were taxed without notice, and a notice of readjustment given. On the readjustment, the defendant appearing and opposing, the clerk disallowed the entire bill, and the plaintiff thereupon moved at special term for a new adjustment. The court at special term directed the clerk "to readjust the bill of costs of this action presented by the plaintiff and to allow the plaintiff full costs as though the recovery had been for $50 or more," and the defendant appealed from the order so directing.

Wyatt & Trimble, for defendant-appellant.

Plaintiff, having recovered less than $50.00, is not entitled to costs. In such an action a plaintiff is not entitled to costs unless he recovers the sum of $50.00 or more.

It must follow therefore, that plaintiff having recovered less than $50,—namely, $1.66,—is not entitled to costs, and defendant is. . . . That the action was commenced to recover more than $50 does not affect the question. He must recover more than $50. He chose to accept payment, and proved a portion of such payment before the referee, and recovered less than $50. The defendant, and not plaintiff, was entitled to costs. Rice *v.* Childs, 28 *Hun*, 303; Brown *v.* Richardson, 7 *Rob.*

57; Bendit *v.* Annesly, 27 *How. Pr.* 104; Keeler *v.* Van Wie, 49 *Id.* 97. . . The fact that the referee directed judgment for costs cannot help the plaintiff; the former had no power to disallow costs; his direction should have no effect. Fuller *v.* Conde, 47 *N. Y.* 90; Benedict *v.* Hale, 4 *N. Y. Civ. Pro.* 316; Lanz *v.* Trout, 46 *How. Pr.* 94; Sturges *v.* Spofford, 68 *N. Y.* 103; Broadway *v.* Scott, 31 *Hun*, 378–381. . . Any agreement or understanding to pay costs is denied by defendant. It is not pretended or claimed that the agreement is in writing or reduced to the form of an order. It is, therefore, a very proper case for the application of rule 11, of the general rules, that is, "No private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be binding, unless the same shall have been reduced to the form of an order by consent and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel." Mason & Hamlin Organ Co. *v.* Pugsley, 19 *Hun*, 232. . . .

The motion to set aside the the judgment was the proper remedy. There was nothing due plaintiff, and defendant had the right to show this and set the judgment aside. Even allowing that $1.66 was due, this motion to set aside the judgment was proper. Jones *v.* Cook, 11 *Hun*, 230; Broadway *v.* Scott, 31 *Id.* 378 . . . In Black *v.* O'Brien 23 *Id.* 82, an order setting aside a judgment for costs was affirmed. Leonard *v.* Columbia Steam Nav. Co., 84 *N. Y.* 55; Binsse *v.* Wood, 37 *Id.* 526; Hammond *v.* Morgan, 101 *Id.* 179, 188; Syms *v.* Mayor, 105 *Id.* 153; Sugden *v.* Hughes, 27 *Hun*, 373 . . . The judge below in his opinion states that the question should have been presented on appeal from the judgment. The learned judge overlooked the fact that an appeal would not lie from the judgment, which had been taken by default, the hearing before the referee being by default. Stoughton *v.* Lewis, 1 *How. Pr. N. S.* 98; James *v.* Russell, 58 *N. Y.*

388; Flake *v.* Van Wagenen, 54 *Id.* 25; James *v.* Shea, 28 *Hun*, 74; S. C., 98 *N. Y.* 625.

Philip Carpenter, for plaintiff-respondent.

This motion to vacate the judgment was properly denied . . . . The judgment cannot of course be vacated upon the ground that costs were improperly allowed.

The defendant's right in this regard can all be settled on his appeal from the order directing the clerk to tax costs. Rice *v.* Child, 28 *Hun*, 303, 407.

If a judgment can be disturbed at all for an error of the referee in directing judgment for costs, it must be by appeal from the judgment and cannot be done on a motion to vacate the error as one of law.

"The report stands at the decision of the court." Code Civ. Pro. § 1228. . . . The order directing the clerk to tax full costs was properly granted, because: First. The original claim was for $92, and was only reduced to less than $50 by payment after the action was commenced. The question is settled by the case of Rice *v.* Child, 28 *Hun*, 303. . . . The plaintiff in this case protected himself exactly as the court in Rice *v.* Child said he could protect himself.

The point made by defendant's present counsel, that as the defendant's agreement to pay costs was not in writing, it should not be regarded, because of rule 11, should not prevail. The rule has no application where a party has been led to rely on the stipulation to his disadvantage. Court rules (*Hun*, 1884), p. 89, notes 8, 9, and cases cited; People *v.* Stephens, 52 *N. Y.* 306, 310, 311.

Again, this agrement was not "in respect to the proceedings in a case" within the meaning of rule 11. It was simply in reference to the receipt of money in settlement of the cause of action and costs. . . .

The clerk had no discretion but to tax full costs. The report of the referee orders judgment for costs in so many words: "The report stands as a decision of the court."

Code, § 1228. The referee settled the plaintiff's right to the costs and the question was not before the clerk. The clerk cannot reverse the decision of a referee upon a question of law; the general term can alone do that on an appeal from the judgment. The clerk being bound to tax the costs, as directed by the referee, the order of the court directing him to so tax them was, of course, right.

INGRAHAM, J.—We do not think that any ground was presented that would justify the court in setting aside the judgment in this action.

The judgment follows the referee's report. If the referee erred, the proper method of review was by an appeal. The order denying the motion to set aside the judgment must, therefore, be affirmed, with $10 costs and disbursements.

The defendant also appealed from an order of the special term, directing the clerk to readjust the bill of costs presented him by the plaintiff, and to allow the plaintiff full costs, as though the recovery had been for $50 or more.

The complaint in the action demanded judgment for a sum of money only, and right to costs given by subdivision 4 of section 3228 of the Code. It is there provided that the plaintiff is not entitled to costs, unless he recovers the sum $50 or more.

In this action, the report of the referee finds, as a conclusion of law, that, at the date of the report, the defendant is indebted to the plaintiff the sum of $1.66, with interest from the 15th day of June, 1887, and, on that report, judgment was entered for the plaintiff for that amount.

Under the provision of the code above mentioned, the plaintiff would not be entitled to costs.

The fact that, at the commencement of the action, the plaintiff's demand was greater than $50, does not entitle plaintiff to costs. The section referred to makes the right

to costs depend upon the amount of the the recovery; not on the amount demanded at the commencement of the action; and as the provision is mandatory, neither the court nor the referee has power to give the plaintiff costs in such an action, unless the recovery exceeds $50, and the provision in the report of the referee that the plaintiff should have judgment with costs was void and did not anthorize the court or clerk to enter judgment for costs.

Plaintiff could have insisted upon his costs as a condition for leave to serve a supplemental answer setting up the payments since the commencement of the action.

Having failed to obtain such a provision in that order, his right to costs depended upon the amount of his recovery. Nor can the court enforce a verbal stipulation, that the payments made on account of the demand set up in the complaint should not affect the right of the plaintiff to his costs. If the stipulation was that the judgment should award the plaintiff costs, notwithstanding the recovery was less than $50, it was within the provisions of rule 11 of the general rules of practice, and could not be enforced unless in writing.

If it was an agreement outside the proceedings in the action, it cannot effect the right of the plaintiff to costs in the action, as that depends upon the amount of the recovery. Defendant not having applied for costs, no question is presented as to his right to costs as against the plaintiff.

The order appealed from must be reversed, and the clerk directed to disallow the plaintiff's bill of costs, and to strike the same out of the judgment, limiting the amount recovered by the judgment to the amount found due by the referee, with $10 costs and disbursements to the appellant.

Freedman, J., concurred.

ABRAMS, AN INFANT, BY HIS GUARDIAN AD LITEM, RESPONDENT, *v.* VAN BRUNT STREET & ERIE BASIN RAILROAD COMPANY, APPELLANT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM, DECEMBER, 1887.

§ 1002.

New trial—When not granted on ground that there is newly discovered evidence.

A new trial will not be granted on the ground of newly discovered evidence where such evidence is plainly cumulative, and it is cumulative when it relates to facts sharply controverted on the trial.

An anonymous letter is entitled to little consideration in a legal tribunal.

(*Decided December* 13, 1887.)

Appeal by defendant, from an order denying a motion for a new trial, on the ground of newly discovered evidence.

Sufficient facts are stated in the opinion.

E. Terry, for defendant-appellant.

William B. Ellison, for plaintiff-respondent.

DYKMAN, J.—This is an appeal from an order denying a motion of the defendant for a new trial on the ground of newly discovered evidence.

The action is for negligence, and has sustained two trials. The first trial resulted in a verdict for the plaintiff for $2,500, which was set aside upon the minutes of the trial court, by reason of the improper admission of

the testimony of the plaintiff, and also because the verdict was against the weight of the evidence. The second trial resulted in a verdict for the plaintiff for $4,000, although he was not sworn as a witness. The usual motion for a new trial on the minutes was denied, and that was followed by a motion based upon affidavits for a new trial on the ground of newly discovered evidence; and that motion was denied also by the same judge before whom the first trial was had, and who set aside the first verdict as being against the weight of evidence.

An appeal from those two orders and from the judgment was taken by the defendant to the general term of this court, where the judgment and both of the orders were affirmed.

Then followed an appeal to the court of appeals from judgment and order of affirmance of the general term, and they were all affirmed in the court of appeals without a written opinion (105 *N. Y.* 677, 911).

The history of the case discloses a severe litigation, and a perusal of the testimony manifests sharp contradictions upon material questions of fact, some of which are entirely beyond reconciliation. It was, therefore, an eminently proper case for the jury, and after two trials, where the facts were found by the jury in favor of the plaintiff, with an increase of the verdict upon the second trial, even when the plaintiff was deprived of the benefit of his own testimony, an appellate tribunal might well refuse to disturb the verdict.

Some of the evidence for which the defendant claims recent discovery, is quite unsatisfactory, even independent of the answering affidavits on the part of the plaintiff.

The statement attributed to one of the jurors respecting the reasons for the rendition of the verdict for the plaintiff is quite incomprehensible, and the anonymous letter is entitled to but little consideration in a legal tribunal.

In addition, it is to be said of the newly discovered evidence, that it relates to no new fact upon which testimony was not given upon both of the trials of this action. The most that can be claimed for it is, that it consists of additional testimony upon facts sharply controverted on both trials, and is, therefore, plainly cumulative, and it is an invariable rule in this State, that a new trial will not be granted for such testimony.*

The testimony for which novelty is claimed must not be cumulative (First National Bank *v.* Heaton, 6 *T. & C.* 37.)

Besides all these difficulties which the defendant encountered upon this motion, the answering affidavits of the plaintiff destroy the force of the moving affidavits and show them to be entirely unreliable.

There must be finality in all litigated cases, and it seems to have been reached in this case. It has been through all the courts upon the last trial, and two unsuccessful motions to arrest the verdict were made previous to the one now under consideration. The struggles against the verdict have been unsuccessful, after full and careful examination, and there was no case made for the interference of the court upon this motion.

The order appealed from should be affirmed, with $10 costs and disbursements.

Barnard, P. J., and Pratt, J., concurred.

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*Evidence is not cumulative unless it is both of the same kind and to establish the same fact. In *Graham's Practice*, at page 630, it is stated to be a well settled rule that "it cannot be objected to the granting of a new trial, on the ground of newly discovered evidence, that such evidence is cumulative, if the evidence alleged to be newly discovered is of a different kind than that adduced on the trial." Citing 4 *Wend.* 579; 4 *Bing.* 171. See also Oakley *v.* Sears (1 *Abb. Pr. N. S.* 368), and Simmons *v.* Fay (1 *E. D. Smith*, 107), to the same effect, and as furnishing examples of evidence held not cumulative.

Facts may tend to prove the same proposition, and yet be so dissimilar in kind, as to afford no pretext for saying that they are cumulative. Guyot *v.* Butts, 4 *Wend.* 579.

GAS WORKS CONSTRUCTION COMPANY OF PHILADELPHIA, RESPONDENT, *v.* STANDARD GAS LIGHT COMPANY OF NEW YORK, LIMITED, ET AL., APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, JANUARY, 1888.

§§ 531, 544.

Bill of particulars—When required—Supplemental answer—When defendant permitted to serve.

Where in an action by the alleged owner of certain patents to set aside assignments of interests therein made by an agent in alleged contravention of the authority given to him, on the ground that the assignments so made were fraudulent and without consideration and were taken with notice of the plaintiff's rights, the answer of the defendants set up that the assignments were executed and delivered for a good and valuable consideration,—*Held*, that the court had power to order a bill of particulars containing particular statements of the consideration which the defendants generally averred, that they paid for such assignments; that to require such particulars was not to require the furnishing of evidence, but was simply to require the giving of information necessary to avoid surprise upon the trial and to afford the plaintiff an opportunity of meeting or explaining such defense.

Watkowski *v.* Paramore (93 *N. Y.*, 467), followed.

Where in an action to set aside alleged assignments of an interest in patents made by an agent of the plaintiff to one A., and by A. to M., and M. to the S. G. L. Co., on the ground that the agent was without authority to make such assignments, and that they were fraudulent and without consideration and taken by the several assignees with knowledge of the fact,—*Held*, that the defendants, S. G. L. Co., and A. should be permitted to plead by a supplemental answer a reassignment by the S. G. L. Co. to A., of said interests, made after

the commencement of the action, and a subsequent reassignment by A. to M. thereof; that for the purpose of determining whether such supplemental answer should be served, it was not necessary to determine whether the assignments had the effect of exonerating the defendants, the S. G. L. Co. and A., from further liability; but it was sufficient that it appeared that they had a material bearing upon the final determination of the rights of the parties.

By the Code of Civil Procedure, § 544, the courts are required to permit a supplemental answer to be served, alleging material facts which have occurred after the answer itself has been served.

(*Decided, January* 23, 1888.)

Appeal by the defendants Standard Gas Light Co., Wallace C. Andrews and Joseph A Monheimer, from an order directing service of a bill of particulars of defense set up in their answers; also, appeal by the Standard Gas Light Co. and Wallace C. Andrews from an order denying motion for leave to serve a supplemental answer, also motions by plaintiff to dismiss said appeals.

Sufficient facts are stated in the opinion.

J. W. Hawes, for defendants, Andrews and Standard Gas Light Co., appellants.

The order for a bill of particulars should be reversed. The only ground for asking a bill of particulars, is that the defendants allege that their assignments were executed for a valuable consideration, and that the assignments themselves recite one dollar, or one dollar and other value. . . . The pleading gives plaintiff all it has at present a right to know, to wit, that the defendants gave a valuable consideration. When it comes to trial, if it has a *prima facie* case, the defendants will have to prove their consideration, and then the plaintiff will have the right of cross-examination. That there was a valuable consideration is the only fact; all the rest is evidence of the fact. . . . . To give information of the proposition for which the pleader contends, is the office of a bill of particulars, not to disclose the evidence on which he relies to prove it.

Gee *v.* Chase Man. Co., 12 *Hun*, 630; Newell *v.* Butler, 38 *Id.*, 104; Depewolf *v.* Hills, 53 *N. Y. Super. Ct.* (21 *J. & S.*) 105; Higenbotam *v.* Greene, 25 *Hun*, 214; Stevens *v.* Webb, 4 *N. Y. Civ. Pro.* 64, 72; Ball *v.* Evening Post Co., 38 *Hun*, 11. . . . .

The order refusing leave to serve supplemental answers should be reversed. The reassignments having been made since the former pleading, the defendants Andrews and Standard Gas Light Co. are entitled to set them up and have their benefit on the trial.

Gratz Nathan, for defendant Monheimer, appellant.

The order appealed from, so far as it directs the appellant Monheimer to serve a bill of particulars, was erroneous. The office of a bill of particulars is not to supply the evidence in an action, but only to apprise the opposite party of the particulars of a matter which might properly form a part of a pleading. It is charged in the thirteenth paragraph of the complaint, that all the assignments were made and accepted with an intention of perpetrating a fraud upon the plaintiff. . . If the plaintiff, without knowledge or information on the subject, has brought an adventurous suit, and seeks to ascertain the real facts of the case from the mouth of this defendant, his remedy is not by bill of particulars, but, if at all, by an examination of the defendant before trial. The assignments in question are not pleaded by the defendants, but are set forth in the complaint and annexed thereto *in extenso*. The defendant presents no counter-claim, or affirmative defense. The information which the plaintiff seeks is not in respect to any claim or defense made by the defendant, but in support of the plaintiff's own case. It is true that, in denying that the assignment by Sherman was fraudulent, this defendant states that it was made and accepted in good faith for a valuable consideration; but that form of denial does not constitute a claim of the defendant, upon which a bill of particulars can be required (*Code Civ. Pro.* § 531).

Delancy Nicoll and *James B. Dill* (*Dill, Chandler & Seymour*, attorneys), for plaintiff-respondent.

The court may in any case direct a bill of particulars of the claim of either party to be delivered to the adverse party. *Code Civ. Pro.* § 531. The plaintiff's demand was consistent with the record. The defendants held property of the value of $100,000 on recorded assignment expressing a consideration of $1. The plaintiff alleged that the consideration was nominal and these assignments were without actual consideration. The answers were not consistent with the record of title but alleged that the defendants each (except Sherman) paid and received full and valuable consideration. The court properly then ordered a bill of porticulars. An order directing a bill of particulars is not reviewable here, unless it clearly transcends the power of the court granting it as defined by the general course of practice. Downey *v.* Volkening, 37 *N. Y. Super.* (5 *J. & S.*) 313; Dwight *v.* Germania Life Ins. Co., 84 *N. Y.* 493; Witkowski *v.* Paramore, 93 *Id.* 467.

When the answer pleads payment upon an affidavit stating that the plaintiff did not know what the payment was, the defendant should give a bill of particulars stating on what payment he relied. Barryman *v.* Taylor, 52 *N. Y. Super.* (20 *J. & S.*) 448.

A case more nearly like the present one is the case of Witkowski *v.* Paramore, 93 *N. Y.* 467.

In this case the plaintiff alleged that he was the equitable owner of a claim, which was assigned by the nominal owner to the defendants to be collected by them for the benefit of the plaintiff. The defendant set up that the claim was originally assigned to the defendant as collateral security for certain advances and for further valuable consideration. The court sustained an order requiring the defendant to furnish a bill of particulars in the minutest detail, as to what this valuable consideration consisted of.

The order refusing defendants leave to supplement

their answer was right. The answer thus sought to be set up is entirely inconsistent with the previous answer, which absolutely and repeatedly justified the title of the defendant, the Standard Gas Light Company of the City of New York, denied the agency of the defendants, Sherman and Monheimer, and all knowledge of such agency, excluded the plaintiff from any right in the patent or equity in them, or right, as the answer says, to interfere with the exclusive possession and ownership of the same by the Standard Gas Light Company of New York.

To set up the fact of these transfers in addition to the matters set up in the answer was to set up a defense inconsistent with the previous answer, created not by the act of any outside third parties, but created by the acts of the defendants themselves, which act the special term held was not in accordance with an honest intention to do justice. Defendants desiring to do justice would have put the property into the possession of the court pending the controversy to transfer the property, pending suit to determine title was a proceeding of doubtful character. The principle involved here is laid down by the supreme court, general term, third department, in the case of Dusty *v.* Lansing, where the court says as follows: "We think it is not necessary here to decide the question whether the proposed answer is a good defense. Our inquiry should rather be whether it is offered in good faith, and without laches." Dusty *v.* Lansing, 3 *N. Y. St. Rep.* 699; Cheeseman *v.* Stuges, 19 *Abb. Pr.* 203. The defendant will not be permitted to set up a tenchnical defense to defeat the just claim of the plaintiff. Holyoke *v.* Adams, 1 *Hun*, 223; Morel *v.* Garelly, 16 *Abb. Pr.* 269. For the same reason the court has refused to grant permission where it was shown that the defense, although strictly legal, was inequitable. Holyoke *v.* Adams, 59 *N. Y.* 233. And it would not be granted if false or contrary to justice, or fraudulent. 7 Taunt. 421. If the application was for leave to submit this defense in addition to the answer already

established, it was properly denied on the principle that a defendant will not be allowed to serve a supplemental answer which will tend to complicate the facts of the case. Buchanan *v.* Comstock, 57 *Barb.* 582. Under such a form of answer the only possible object of such a claim would be to complicate the case. . . . There is no reported case which counsel for the respondent can find where a party was allowed, after a suit brought to determine the title to property and damages claimed for the detention of it, to pass the property out of his hands into the hands of another defendant; and then to be allowed to plead such acts of his own either in mitigation of damages or by way of defense.

Daniels, J.—The action has been brought to set aside and annul assignments of one-half of certain patents for improvements in hydro-carbon gas generators. The plaintiff prosecutes the action as the assignee of the patentee, and employed Benjamin F. Sherman to make a sale of the patented invention for the city of New York. To empower him to act in that capacity, an assignment of the patents to that extent was made to him, and he, as it is alleged, in contravention of the intended authority given to him, assigned a one-half interest in the invention to the defendant Monheimer for a nominal consideration, and Monheimer afterward assigned the same interest to the defendant Andrews, and he assigned that interest to the Standard Gas Light Co. of the city of New York.

It is averred in the complaint that these assignments were fraudulent in their character, and made without consideration and with notice of the plaintiff's right and title to the invention. These defendants admitted the assignments respectively made to them, but alleged them to have been executed and delivered for a good and valuable consideration, without stating or disclosing the particular nature or extent of that consideration, and the order directed the service of a bill of particulars, requir-

ing these defendants to serve a statement in writing of the consideration paid, to whom paid and received—when, where, and the amount, if in money.

Whether the assignments were made for a good and valuable consideration will probably prove a material subject of litigation and inquiry upon the trial. The existence of that consideration is contested by the plaintiff and asserted by these respective defendants.

What the order requires to be done is to apprise the plaintiff of the actual consideration paid for each of the assignments. It is not evidence that is wanted, but a statement of the facts of what the consideration will be alleged to consist, for which these respective assignments were executed and delivered. And that the court has the power to order a bill of particulars, or a particular statement of the consideration which has been so generally averred and relied upon in the answer, was held in the case of Witkowsky *v.* Paramore, 93 *N. Y.* 467.

The statement which the order directs to be served will do no more than to apprise the plaintiff of the particular consideration for which the assignments were executed and delivered, and that information is necessary to avoid surprise upon the trial, and to afford the plaintiff the opportunity of meeting or explaining the statement by evidence, so far as that may be in its power, if it shall afterward become necessary, when the trial of the action shall take place. The order requiring the service of these particular statements seems to be justified by the circumstance that the plaintiff was not a party to either of the assignments, and they materially affect its rights and interests as owner of the invention, and it can only obtain the information necessary to place it in a position to meet the averments made, by the service of the statement provided for in this order. And the propriety of requiring it has not been removed by the assignments of the controverted interest from the Standard Gas Light

Company to the defendant Andrews, and the assignment thereof from Andrews to the defendant Monheimer. For it may still be insisted by the latter upon the trial that these other defendants obtained a legal title under their assignments, and that he is entitled to be protected in the enjoyment of that title as their asignee.

The fact that the plaintiff is entitled to the statement of the particulars directed to be served by the order, renders it unnecessary to consider the objection made, that the defendants have deprived themselves of the right to appeal, by obtaining an extension of the time to comply with the order for the service of the particulars. That motion may, therefore, be dismissed, as it should be, without costs.

The application of the defendants, the Standard Gas Light Company and Wallace C. Andrews, for liberty to serve a supplemental answer, was made upon the ground that they had assigned and transferred their interests under the assignments to them, back to the defendant Monheimer.

These assignments were made after the service of the answers in the suit and may have the effect of exonerating these particular defendants from further liability after the execution and delivery of their assignments. It is not requisite that it be determined whether their assignments will be attended with that result or not. It is sufficient for the purpose of the litigation that they may have a material bearing upon it in the final determination of the rights of the parties, and that is sufficient, under section 544 of the Code of Civil Procedure, to entitle them to an order permitting the service of their supplemental answers. By that section the courts are required to permit such an answer to be served, alleging material facts which have occurred after the answer itself has been served to the plaintiff's complaint. The facts which have been presented bring the case within this section of the Code.

The supplemental answers will work no legal injury to the plaintiff, but they may be of material benefit to all the parties in the litigation, for they will present a truthful statement of these additional facts, which it may prove important for the court to consider upon the final trial and hearing.

The order denying the motion for leave to serve the supplemental answers should be reversed, with ten dollars costs, and also the disbursements, with liberty to the defendants to serve such answers on payment of the costs of opposing the motion within ten days after the notice of this decision, and the order directing the service of the bills of particulars should be affirmed, with the same costs and disbursements, and with liberty within the same time to serve the bills or statement of the particulars previously mentioned.

And the motion to dismiss the appeal from the order for the bills of particulars should be dismissed.

Van Brunt, P. J., and Brady, J., concurred.

HARDIE *v.* ANDREWS.

Supreme Court, Fourth Department, Onondaga County, Special Term, March, 1888.

§§ 2345, *et seq.*, 2356.

Sale of infant's real property—Contract to be executed—Effect of erroneous distribution of proceeds—Conveyance—Effect of granting clause and habendum in determining who is grantee.

Where a deed named a husband and his wife as the parties of the second part; but the granting clause thereof named only the wife as the grantee, and the *habendum* named the wife, "her heirs and assigns," as the persons who were to have and hold the said premises, "to their own use and behoof forever,"—*Held*, that the deed

conveyed no interest whatever to the husband, but ran exclusively to the wife and her heirs.

Where a deed omits the name of the grantee from a part thereof that proceeds the *habendum*, but states it in such clause, it is sufficient, and makes the deed effective.

Prior to the enactment of section 2356 of the Code of Civil Procedure it was not necessary that a guardian for minors appointed in a proceeding to procure the sale of land belonging to minors should makea written agreement to sell subject to the approval of the court an report the same under oath, but it was sufficient if the agreement was verbal. The only effect of the agreement not being in writing was that the purchaser should not be compelled to complete his purchase. It did not affect his title if he accepted the conveyance and paid the purchase price.

It seems that under the Code of Civil Procedure, section 2356, a special guardian appointed in proceedings to dispose of real property belonging to infants must make a written contract for the sale of the property subject to the approval of the court and report the same under oath, and that where he had made such a contract and reported the substance thereof to the court it might well be held after performance to be a substantial compliance with the law.

The title of a purchaser of an infant's property at a sale duly made in proceedings instituted for the sale of his interest is not affected by an erroneous direction afterwards made as to the distribution of the proceeds of such sale.

(*Decided March* 12, 1888.

Trial of action before the court without a jury.

This action was brought to enforce the specific performance of a contract, dated January 31, 1888, for the sale of certain real estate, situate on the northwest corner of Warren and Onondaga streets, in the city of Syracuse, N. Y.

The complaint alleges that on the 8th day of February, 1888, the day when said contract was to be performed, by its terms, the plaintiff tendered to the defendant a good and sufficient deed of the premises in question, and demanded the fulfillment of the contract on the part of the defendant, which was refused. The answer admits all the facts stated in the complaint, and alleges that the

title to the premises in question is defective. The action is a friendly one, and the parties agree that the alleged defect in the title grows out of the following facts and circumstances:

About the year 1848 one Jasper Hopper died seized of the premises in question, leaving a last will and testament by which he devised the same to his three children, John J., Catharine, and George C., share and share alike. The said Catharine afterwards became the wife Z. Lawrence Beebe.

March 6, 1849, the said John J. and George C. Hopper executed a deed of their interest in said premises, being two-thirds, in which deed Z. Lawrence Beebe and Catharine Hopper Beebe, his wife, are named as parties of the second part. In the granting clause the parties of the first part "do forever release and quit-claim the premises in question to Catharine Hopper Beebe, and to her heirs and assigns forever."

The *habendum* reads as follows: "To have and to hold the said released premises unto the said Catharine Hopper Beebe, her heirs and assigns, forever, to their own proper use and behoof forever."

The said Catharine Hopper Beebe died intestate during the lifetime of her husband, Z. Lawrence Beebe, who afterward remarried. The said Z. Lawrence Beebe died about the year 1868, leaving a last will and testament, by which he devised the premises in question to the children of the said Catharine Hopper Beebe, namely, Charlotte E., Z. Lawrence, Catharine H., Z. Louisa and Mary E. The devisees Z. Lawrence and Charlotte E., being of full age, conveyed their interest in said premises by deed dated January 17, 1871, to the plaintiff. The other devisees being infants, infancy proceedings were instituted for the sale of their interest, which, subsequently was conveyed to the plaintiff by deed dated February 1, 1871.

The alleged defeat of title consists of supposed irregu-

larities in said proceedings, which were conducted on the theory that the second wife of Z. Lawrence Beebe was entitled to dower in said premises, and she actually received the sum of $1,398.04 out of the proceeds of said sale, in satisfaction of her supposed dower interest.

The other irregularity complained of is that the special guardian did not enter into an *agreement in writing* with the purchaser under said proceedings, or at least that no such contract appears in the report of said proceedings. The referee made his report, under oath, in the following language: "I have entered into an agreement for the sale of all the right, title and interest of the above-named infants in and to the two pieces of land first described in the petition in this matter, with James Hardie, of Onondaga, and that the consideration money to be paid by the said James Hardie for said infants' interest in said premises is the sum of $5,161.17, which is at the rate of $10,000 for said two pieces of land. $2,000 of said purchase money is to be paid down, the balance to be secured by the bond of the purchaser, and a mortgage on the premises sold, payable in five years with interest."

A. H. Sheldon, for plaintiff.

Stone, Gannon & Petit, for defendant.

Vann, J.—The parties to this action, after agreeing upon the facts, present certain questions of law for decision, which will be considered in their natural order.

1. In whom did the title vest by virtue of the conveyance from John J. and George C. Hopper, dated March 6, 1849?

Although Z. Lawrence Beebe was named in the deed as one of the parties of the second part, the granting clause, which effected the transfer of title, conveyed no interest to him, but ran exclusively to his wife and her heirs. The *habendum* clause, in addition to its usual office of describing the

kind of estate granted, also limited the grant to the wife and her heirs exclusively. This shows that Mr. Beebe's name was not omitted from the granting clause by mistake, and makes doubly clear the intention of the grantors. Even when the name of the grantee is omitted altogether from all that part of the conveyance that precedes the *habendum* clause, and known as the premises, if it is inserted in that clause it is sufficient, and makes the deed effective (Berry *v.* Billings, 44 *Me.*, 416, 423; Bridge *v.* Wellington, 1 *Mass.* 219).

2. Was it essential that the special guardian should report that an agreement in writing had been made with the purchaser in the proceedings for the disposition of the real property of the infants?

The report of the special guardian states that he has entered into an agreement for the sale of the infants' interest, and specifies the name of the purchaser, and the terms of the contract; but it does not expressly state that the agreement was in writing. No written agreement either original or copy, appears in the record of the proceedings.

The statute in force in 1871, when the sale in question was made, differs in some respects from the one now in force. It is provided by section 2356 of the Code of Civil Procedure that the special guardian must enter into an agreement to sell subject to the approval of the court, and report the same under oath. The word "enter" implies a written agreement. The former statute simply provided that upon an agreement for a sale being made the same should be reported to the court on the oath of the guardian making the same (3 *R. S.* 201 § 121, 6th ed.) While the present statute requires an agreement in writing, the old law was not so exacting, and accordingly the practice widely prevailed for the guardian to make a verbal contract to sell. The effect of this method of procedure was that the purchaser could not be compelled to complete his purchase (*In re.* Hazard, 9 *Paige*, 365). It

did not affect his title, however, if he accepted the conveyance and paid the purchase price. It does not expressly appear in this case whether the agreement between the guardian and the purchaser was in writing or not, although from the form of the report it is to be inferred that it was in writing. Even under the statute now in force, if the contract to sell is in writing, and the substance thereof reported to the court, it might well be held, after performance, to be a substantial compliance with the law. It is unnecessary, however, to now pass upon that, as the proceedings in question were regular, so far as the point under consideration is concerned.

3. Was the title of the purchaser in the infancy proceedings affected by the wrongful distribution of the proceeds?

If the position already taken is correct, Z. Lawrence Beebe never had any interest in the premises in question, except as tenant by curtesy. As his first wife died intestate after the birth of lawful issue, he had a freehold estate for the term of his natural life. This was owing to the marriage relation, however, and not simply to the conveyance of March 6, 1849. When he died his interest in the premises ceased, and his widow was not entitled to dower therein. The proceedings to sell the interest of the three infant children of said Z. Lawrence Beebe by his first wife were conducted on the theory that the second wife was entitled to dower, and the sum of $1,398.04 was actually paid to her out of the proceeds of the sale. She had no right to that sum; but is the purchaser to suffer on that account? Is his title affected by the erroneous decision of the county court, made after such title had already vested in him? It would be a harsh and unreasonable rule to require the purchaser to look after the distribution of the proceeds at his peril, for it is a subject over which he has no control. What could he do even if he discovered that the proceeds were about to be improperly distributed? What right or opportunity would

he have to be heard on that subject? If he secured a hearing as a matter of favor, and the court notwithstanding erred in its order of distribution, he would have no standing for an appeal, and hence would be powerless to correct the error. The error of the court did not affect the action of the purchaser. He paid the same amount whether the deed to Mrs. Catharine Hopper Beebe was construed in one way or the other. If the proceedings are regular at the time that he pays the purchase price and accepts the proper conveyance, he has no further concern in the matter. All the responsibility for the subsequent proceedings rests upon other shoulders than his. Upon payment by him of the agreed price the land becomes his, while the money belongs to the infants. If the court, whose wards the infants are, inadvertently awards some of the money to a person who is not entitled to it, that error does not reach back and vitiate the title that was regularly and legally conveyed at the time that the money was paid. The remedy of the infants for such a wrong would not be against the purchaser by depriving him of the title that he had paid for, and that was good when he paid for it (Davison *v.* De Freest, 3 *Sand. Ch.* 456).

The title tendered by the plaintiff was free from valid objections, so far as appears, and the defendant should perform his agreement.

Findings may be prepared and a decree entered accordingly.

MOULTON, APPELLANT, v. MOULTON, ET AL., IMPLEADED, ETC., APPELLANTS.

DUNCAN AND ANOTHER, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MARCH, 1888.

§§ 426, 427.

Infant—Service of summons upon—Action for partition.

Where, in an action for the partition of real property, an infant over fourteen years of age, owning a part thereof, was served with the summons by delivering a copy thereof to him while he was absent from the country, attending school in Switzerland, without an order having been made, directing service by publication or without the State, and thereafter, upon his own petition setting forth that he had been served with the summons, a guardian *ad litem* was appointed for him who appeared and admitted service of the summons and complaint and served a general answer,—*Held*, that the summons had not been so served, as to give the court jurisdiction of the person of the infant; [9, 10] that a judgment directing a sale of the property in suit, and the sale thereunder, were invalid, and that a purchaser at such sale should not be compelled to complete purchase. [8, 9]

It seems to be necessary where one of the parties defendant in an action is an infant over the age of fourteen years, that the court should exercise its discretion to order or refuse to order the delivery of the summons and complaint to a disinterested third person on behalf of the infant; [1, 2] but an application for and the making of such an order will not give the court jurisdiction where the infant himself has not been duly served. [11]

It seems, that where upon an application for the appointment of a guardian *ad litem* of an infant defendant who was upwards of fourteen years of age, that fact appears in the petition and the court grants the application without directing delivery of a copy of the summons and complaint pursuant to section 427 of the Code of Civil Procedure to

a disinterested person on behalf of the infant, that it may be presumed that the court did not consider it necessary to order such further service, the making of such an order being in the discretion of the court. [12]

The rule under the Revised Statutes that in an action for partition, jurisdiction was acquired of an infant by the appointment of a guardian *ad litem* in the first instance, upon notice to such infant or his general guardian, has been abolished by the repeal of 2 R. S., 317, relating to proceedings for the partition of real property. [3-6]

Gotendorf *v.* Goldschmidt (83 N. Y. 110); [4] Schriver *v.* Schriver (12 *N. Y. Weekly Digest*, 328), [7], distinguished and not followed. Ingersoll *v.* Mangam (1 *N. Y. Civ. Pro.* 151), followed. [5]

(*Decided March* 2 *and* 28, 1888.)

Appeal by plaintiff and certain of the defendants from an order of special term denying motion to compel purchasers at sale under decree in action for partition to complete purchase, and relieving them therefrom.

This action was brought by one of the children of Charles Frederick Moulton, who died intestate in Paris, France, on April 18, 1887, to partition certain real property of which said decedent died seized, situate on Broadway, near Spring street, in the City of New York.

The defendants in the action were a son and daughter of the decedent, three grandchildren of the decedent, the husband of one of such grandchildren, and the wife of the plaintiff. One of the grandchildren, Francis Joseph Moulton, was an infant over fourteen years of age, and at the time of the commencement of the action was attending school at Berne, Switzerland. On August 8, 1887, an order was made *ex parte* appointing Joseph F. Greenough, guardian *ad litem* for said Francis Joseph Moulton. This order was granted upon the petition of said Francis Joseph Moulton, which, omitting title and signature, was as follows.

"To the supreme court of the State of New York:

"The petition of Francis Joseph Moulton, one of the

defendants in the above entitled action, respectfully shows to the court:

"I. That this action is brought for the partition or sale of certain real estate in the city of New York, known as No. 550 Broadway, in which premises your petitioner has an undivided twelfth interest as a son of Charles R. M. Moulton, a deceased son of Charles Frederick Moulton, deceased.

"II. That the summons in this action was served on your petitioner on the 15th day of July, 1887.

"III. That your petitioner is an infant over the age of fourteen years but under the age of twenty-one years, to wit, of the age of nineteen years, on the 2nd day of February, 1887, last, and that his father is dead and he has no testamentary guardian, and no guardian *ad litem*, has been appointed for him herein.

"Your petitioner therefore prays this honorable court to appoint Joseph F. Greenough, of the city of New York (who is his uncle and only next of kin in New York State, and is a competent and responsible person, and who has no interest adverse to those of your petitioner), as his guardian *ad litem*, to take charge of his interests in relation to the proceedings for a partition or sale of the premises above mentioned.

"Dated, 18th July 1887."

This petition was verified on July 18, 1887, at the "Republic of Switzerland, Canton of Berne," before the acting consul general, and had annexed thereto, the consent of Joseph F. Greenough, to act as the proposed guardian *ad litem*, and his affidavit showing that he was a competent and responsible person, verified August 6, 1887. No other proof of the service of the summons and complaint upon said infant is contained in the judgment-roll, but there is therein, an admission signed by the guardian *ad litem* and dated August 8, 1887, of due and

timely service on the guardian *ad litem* on behalf of said infant defendant, of the summons and complaint herein, which is duly acknowledged, and also an answer of said infant by his guardian *ad litem* setting forth "that he is an infant under the age of twenty-one years; that he is a stranger to all and singular and matters and things set forth in the complaint, ... and claims such interest in the premises in said complaint described as he is entitled to, and he submits his rights and interests in all the matters in question in this action to the protection of the court."

None of the material allegations of the complaint were put in issue by any of the answers served, and the usual proceedings were taken therein, resulting in an interlocutory judgment, decreeing a sale of the premises described in the complaint, and appointing a referee to make the sale. The premises were subsequently duly advertised for sale, pursuant to this judgment, and on October 27, 1887, were sold at auction to the respondents, David and John P. Duncan, who bid therefor the sum of $133,000, and paid on account of such purchase price, $13,300. The referee duly made his report of such sale, and, on October 29, 1887, final judgment was entered confirming the sale, directing the delivery of the referee's deeds for the premises so sold upon the payment of the balance of the purchase price, and also providing for the payment of costs and allowances of counsel, and a division of the remainder among those entitled. Thereafter, on the same day, the said purchasers declined to accept the referee's deed to the premises, on the ground that a good and marketable title thereto was not thereby conveyed, for the reasons, among others, that the court had not obtained jurisdiction in this action over the infant defendant, Francis Joseph Moulton, so as to bind him by the judgment herein.

On December 21, 1887, the plaintiff, upon an order to show cause, and affidavits, moved this court, at a special

term, for an order compelling the respondents, Duncan, to complete their purchase, and the said repondents, upon another order, to show cause and affidavits, applied for an order relieving them from their purchase, and canceling the sale, and directing the return of the deposit made by them, with interest and expenses, and an order was made denying the plaintiff's motion and granting that made by the purchasers. Thereafter, the plaintiff, and all the defendants, except one, appealed from said order.

Benjamin T. Kissam (*Benjamin T. Kissam*, attorney for plaintiff; *John E. Ellison*, attorney for all adult defendants, except one, and for guardian *ad litem* of infant defendant), for appellants.

An infant over fourteen years of age is *sui juris* after the service of a summons, and may accept service in any form or manner. *Code Civ. Pro.* § 426, subd. 4; Thistle *v.* Thistle, 5 *N. Y. Civ. Pro.* 43. Having been served with the summons, as he states in his petition, he voluntarily appeared and petitioned this court to appoint a guardian *ad litem* to represent him; which was thereupon done, and he appeared for the infant and put in an answer which gave the court jurisdiction. *Code Civ. Pro.* § 424, and cases below cited. When service upon the infant is required, its only effect is to limit the time within which he may apply for the appointment of a guardian. Varian *v.* Stevens, 2 *Duer*, 638; Gotendorf *v.* Goldschmidt, 83 *N. Y.* 110; *Code Civ. Pro.* § 116, subd. 2; *Code Pro.* § 471.

Code Pro. § 134, subd. 4 (in respect to service), is substantially re-enacted in *Code of Civil Procedure*, § 426, subd. 4.

Code Pro. § 139 (in respect to voluntary appearance), is re-enacted in *Code of Civil Procedure*, § 424.

Code Pro. § 116, subd. 2 (in respect to the appointment of a guardian), corresponds generally with section 471 of *Code of Civ. Pro.* Varian *v.* Stevens is cited and approved

of in Rogers *v.* McLean, 31 *Barb.* 304, also approved of by the court of appeals in same case, 34 *N. Y.* 536, 542. To the same effect, see Jennings *v.* Jennings, 2 *Abb. Pr.* 6; Disbrow *v.* Folger, 5 *Abb. Pr.* 54; Wellington *v.* Claason, 9 *Abb. Pr.* 177; and in Shriver *v.* Schriver, 12 *N. Y. Weekly Dig.* 328. The first objection was, that the "judgment and all proceedings in the action were invalid and void by reason of the infant defendant, Bertha Ball, never having been served with the summons and complaint in this action." It was held the appointment of guardian *ad litem*, for a non-resident defendant over fourteen years of age, upon the petition of such infant, together with an appearance and answer by said guardian, is sufficient to give jurisdiction to the court without service of a summons upon the infant. In this same case, on appeal to the court of appeals (86 *N. Y.* 580), the chief justice says: "Most of the objections to the title set up by the purchaser have been answered by the learned general term," thus affirming the decision of the court below in respect to the foregoing objection. In Thistle *v.* Thistle (5 *N. Y. Civ. Pro.* 43), decided in February, 1884, Donohue, J., says, "The sole object of the service is to procure the appearance of the party. Where, as in this case, the infant has, on the application of his own voluntary representation, appeared, that is sufficient, the intent of the Code being that the infant should have his day in court, and the infant has had it here. How the service was made is of no mportance, as the appearance is not dependent on that." The motion to compel the purchasers to complete, and accept the deed tendered them should have been granted.

. . . . The sworn statement of the infant cannot be challenged. Syracuse Savings Bank *v.* Burton, 6 *N. Y. Civ. Pro.* 216, 221. The judgment is *prima facie* evidence of the jurisdiction, and recitals may prove jurisdiction applicable to infants as well as adults. Bosworth *v.* Van-

dewalker, 53 *N. Y.* 597; Read *v.* Read, 7 *N. Y. Weekly Dig.* 244; Barnard *v.* Heydrick, 49 *Barb.* 62, 72.

T. S. Ormiston (*Ormiston & Dorset*, attorneys), for purchasers, respondents.

Francis Joseph Moulton, a necessary infant defendant, was not served with the summons. This was admitted on the argument below. It is, however, evident on the record. Service of a summons is a question of law as well as of fact; or rather, it is a conclusion of law, to be determined only after the facts purporting to make service are known. The infant's statement is a bare conclusion, and must be considered in the light of other circumstances,—*i. e.*, that he makes it in Switzerland three days only after he says service occurred, a physical impossibility, except under an order for personal service without the State. The statement cannot be viewed as an admission of service, because it does not state the place of service, and because the petitioner is not an adult. *Code Civ. Pro.* § 434. The fact undoubtedly is that, by mail, he was apprised of the suit, and was furnished with the petition, and, three days later, verified it. He is, therefore, not bound by the judgment, and the title, through the referee's deed, is defective. Actions for partition are now controlled by *Code Civ. Pro.* § 1532–1595. Section 1535 provides that a guardian *ad litem* for an infant party can be appointed only by the court. Sections 1577 and 1557 provide that a final judgment in these actions is binding and conclusive upon the plaintiff; each defendant upon whom the summons was served, either personally or without the State, or by publication, pursuant to an order obtained for that purpose; and the legal representatives of each party. None other of those sections bears at all upon the point in question.

By the above sections jurisdiction is obtained over, and final judgment is conclusive upon only those served with the summons, and the legal representatives of those

served. But by section 424 a voluntary general appearance of a defendant is equivalent to personal service of the summons upon him. Can the petition of the infant herein be construed to be a voluntary general appearance? The court of appeals, in Ingersoll *v.* Mangam, 1 *N. Y. Civ. Pro.* 151, decides this in the negative. Judge ANDREWS, in an opinion in which all concur (RAPALLO, J, absent), says (p. 156), "The appearance by the guardian was not an appearance by the infant, and was not within section 424. The infant was incapable of consenting to such appearance, and the gurdian could not consent to the exercise of jurisdiction over him by an appearance not preceded by the service of process." Without service of the summons in some of the forms prescribed in Code of Civil Procedure, or advantage taken of the methods, if applicable to the facts of this case set forth in section 473 of this Code, jurisdiction has not been obtained over the infant. In Walter *v.* DeGraff, Judge O'GORMAN distinctly declared this doctrine as applicable even to a partition suit. See his opinion in the Daily Register, October 24, 1887; S. C., 19 *Abb. N. C.* 406; 11 *N. Y. St. Rep.* 274. There has been no doubt of the necessity in all cases save partition suits. Ingersoll *v.* Mangam, 1 *N. Y. Civ. Pro.* 151. This case and Gotendorf *v.* Goldschmidt (83 *N. Y.* 110), clearly show the reason for the different rule existing in partition proceedings. These were formerly controlled by the Revised Statutes (part III. chap. V. title 3, 6th ed. p. 582), under which proceedings were instituted by petition, not a summons; and jurisdiction over infants was acquired by the appointment of a guardian, or notice to the infant or his general guardian. By section 448 of the Old Code, these provisions of the R. S. controlling partition were made applicable to actions for partition under that Code, so far as the same could be applied to the substance and subject matter of the action without regard to form. . . . . And substantially the same procedure would in a certain specified case be still valid under

section 443 of our present Code, which was not adopted, however, herein. But these provisions of the R. S. were repealed by Laws of 1880, chap. 245, and all partition suits instituted after Sept. 1, 1880, are governed exclusively by the Code of Civil Procedure. None of the cases in the books uphold the jurisdiction of the courts over infants not served with the summons arose under the new provisions, with the possible exception of the special term case of Thistle *v.* Thistle, 5 *N. Y. Civ. Pro.* 43. In the case specially relied on by the appellant, Shriver *v.* Shriver, 12 *Weekly Dig.* 328, the petition of the infant for a guardian *ad litem* (See Appeal Book 21, of 1881, No. 329), was verified April 30, 1880, and while the general term, under the authority of Gottendorf *v.* Goldschmidt, held that the court had obtained jurisdiction, the court of appeals (86 *N. Y.* 580) affirmed the order relieving the purchaser for another reason, without considering this point. In Thistle *v.* Thistle (5 *N. Y. Civ. Pro.* 43), the same learned justice who made the order appealed from herein, held that how service was made under section 440 of the Code of Civil Procedure is of no importance, as the appearance is not dependent on that. Service was claimed to have been made, under an order for publication, and the correctness of the above decision is not necessarily involved herein.

Brady, J.—The respondents purchased at a sale, made pursuant to the judgment in this action, which was one for the partition of lands, but refused to complete, for two reasons. The first* was that Francis J. Moulton, an infant over nineteen years of age, who was a necessary party, and temporarily at school in Berne, Switzerland, on being

* The first objection, as stated in the written reason. for refusing to take title filed by the purchasers with the referee to sell, was that "it is not shown that the court obtained jurisdiction in this action over the defendant Francis Joseph Moulton so as to bind him by the judgment herein."

served with a summons made application to this court, in writing, for the appointment of a guardian to protect his interests.

In his affidavit it was stated that he had been served with a summons, that his father was dead, and that he had no testamentary guardian and no guardian *ad litem*, and asked to have his uncle appointed guardian *ad litem*, which was done.

By section 426 of the Code, provision is made for the personal service of a summons upon a defendant if an infant under the age of fourteen years, and it is declared that it must be made by delivering a copy to him and also to his father, mother or guardian, or, if there be none within the State, to the person having the care and control of him or with whom he resides, or in whose service he is employed.

[1] By section 427 it is provided that when the defendant is an infant of the age of fourteen years or upward, the court may, in its discretion, with or without application therefor and in the defendant's interest, make an order requiring a copy of the summons to be also delivered in behalf of the defendant to a person designated in the order, and that the service of the summons shall not be deemed complete until it is so delivered.

It is true that this section relates as well to a defendant who by reason of habitual drunkenness or for any other cause is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, and has relation, therefore, to the second subdivision of section 426, to which reference has been made, and which provides for service of the summons upon a person judicially declared to be incompetent to manage his own affairs in consequence of lunacy, &c.

[2] It thus appears that when the infant is fourteen years and upwards, the service must be made as indicated upon the infant and some person to be designated

by the court in the exercise of its discretion. No application was made under the section, and it appears to have been ignored.* It seems to be a very remarkable feature of the statute, but we must accept it as we find it and give it its force as an existing impediment.

[3] Prior to the passage of the act of the Legislature in 1880, chapter 245, which repealed the provisions of the Revised Statutes for the partition of lands, it was held that jurisdiction over the person and property of infants was acquired by the appointment of a guardian in the first instance upon notice to such infants or their general guardian. It was considered that service of notice upon the infants was not indispensable to the exercise of discretion, and this resulted from the fact that the provisions referred to were, by section 448 of the Code, made applicable to actions for partition, so far as they could be applied.

[4] In Gotendorf *v.* Goldschmidt (83 *N. Y.* 110), it was decided that personal service of the summons upon the infant was not essential to give the court jurisdiction, and thus a distinction was intimated between an action of foreclosure and an action for partition, which was subsequently more fully declared. For in the

[5] case of Ingersoll *v.* Mangam (1 *N. Y. Civ. Pro.* 151), which was an action of foreclosure, it was determined that the provisions of section 416 (now, under the present Code, section 426), were applicable, and that a defendant under fourteen must be served with a summons, as therein prescribed, in order to acquire jurisdiction over him and his estate involved, and the distinction between such an action and an action for partition is referred to and stated, and it was held that the voluntary appearance of the infants by the guardian was not sufficient to confer jurisdiction, and that the order was unauthorized, inasmuch as from the failure to serve the sum-

* See opinion filed on reconsideration of this appeal, *post*, p. 433.

mons in the manner required by the section, the court acquired no jurisdiction over the infant or to appoint a guardian *ad litem.**

[6] The repeal of the provisions of the Revised Statutes already referred to placed the proceedings in partition upon the same statutory enactment which govern other actions, and therefore it is required that the service upon the infant shall be as declared by the Code.

There was no order made in this case as contemplated by section 427 of the Code, and therefore the infant was not properly served with the summons, and the court acquired no jurisdiction over him.†

[7] In the case of Schriver *v.* Schriver (12 *N. Y. Weekly Dig.* 328), the petition of the infant for the appointment of a guardian was verified on the 30th of April, 1880, and before the passage of the act of 1880, and the application was, therefore, properly granted in accordance with what was then the practice. It is no longer an authority upon the subject of this appeal in consequence of the change accomplished by the act of 1880.‡

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* To the same effect, Bellamy *v.* Guhl (62 *How. Pr.* 460), but see Thistle *v.* Thistle (5 *N. Y. Civ. Pro.* 43), holding that appearance by guardian *ad litem* confers jurisdiction.

† See opinion filed on reconsideration of this question, *post*, p. 443.

‡ The decision in Schriver *v.* Schriver was made upon an application by a purchaser at a sale, under a decree in partition to be relieved from his purchase. He objected to taking title on several grounds, and among others: "that the judgment and all proceedings in this action are invalid and void, by reason of the infant defendant Bertha Beall, never having been served with the summons and complaint in this action." It appeared from the papers upon which the decision was made that Bertha Beall, an infant over the age of fourteen years, having an interest in the premises which were the subject of the action, had been made a party defendant, thereto, and that she presented a petition to the Court for the appointment of the guardian *ad litem*, in which she stated "that she was eighteen years of age on the 26th day of January, 1880, and resided with her father, Alpheus Beall, at Cumberland in the State of Maryland; that, as she is informed an

[8] The result of these considerations is that the judgment under which the sale was made was invalid, and

action has been commenced in this court against your petitioner, said infant, and others by William Schriver for a division and partition of certain real estates situated in the city of New York. . . . That the summons has not been served on your petitioner, and your petitioner has no general and testamentary guardian residing in the State of New York, and no guardian *ad litem* has been appointed for your petitioner," and asks for appointment of Jacob Fromme, as guardian *ad litem* "for special purpose of taking charge of said infant's interest relating to the proceedings for the partition of the premises above mentioned." This petition was duly verified, and, annexed thereto, was the consent of Jacob Fromme to act as such guardian *ad litem*, and an affidavit, showing his disinterestedness, competence and responsibility. The petition was dated and verified at Cumberland, Maryland, on April 20, 1880, and an order was made and entered May 8, 1880, appointing said Jacob Fromme such guardian *ad litem*. Service of the summons and complaint in the action was admitted by said guardian *ad litem*, for the infant on May 11, 1880, and a general answer on behalf of said infant was served May 13, 1880. All these proceedings, therefore, were taken before the last nine chapters, Code of Civil Procedure, which contain the provisions relating to actions for partition, went into effect, and also before chapter 245 of the Laws of 1880, repealing 2 R. S. 317, chap. 5, which included the provisions relating to proceedings for the partition of real property, took effect. The court, at special term, granted an order relieving the purchaser from his purchase, but did not file any opinion showing the ground on which this relief was granted. The order of the special term was affirmed by the general term because of objections other than that above specified. The only portion of the general term opinion (written by DAVIS, P. J., and concurred in by DANIELS and BRADY, JJ.), referring to said objection, is the following paragraph thereof:

"The several grounds of objection specified were—

"*First.* That the judgment in the action was invalid and void by reason of the infant defendant, Bertha Beall, never having been served with the summons and complaint. It appears that the infant mentioned in this objection was a non-resident of the State, over the age of fourteen years. She filed her petition for the appointment of a guardian *ad litem*, upon which such guardian *ad litem* was appointed, and the summons and complaint were served upon him He appeared in the action on behalf of the infant and put in an answer.' It was not necessary under such circumstances that it should appear that she had been served with the summons. The appointment of the guard-

that the purchaser was properly relieved from any obligation to complete the purchase.

For these reasons, the order appealed from must be affirmed, with $10 costs and disbursements.

VAN BRUNT, P. J., and DANIELS, J., concurred.

Upon a reconsideration of this appeal the following supplemental opinion was filed:

[9] BRADY, J.—A reconsideration of this case has led to the conclusion that the judgment heretofore declared herein is correct, but it results from the failure of the plaintiff so to serve the summons as to acquire jurisdiction.

The minor was absent from this State, and in Switzer-
[10] land, where it was served upon him, and without any order of publication existing.* This was unauthorized under the provisions of the Code, sections 426 and 427. The failure to apply for an order for the
[11] additional service under the provisions of the last section mentioned, was for this reason unnecessary, and if made, it would not under the circumstances have corrected the error suggested. The decision herein, therefore, so far as it embraced that question, was not requisite to the disposition of the appeal. Further considera-

ian and his appearance and answer were quite sufficient to give the court jurisdiction. Gotendorf v, Goldsmith, 11 *N. Y. Weekly Dig.* 295."

The court of appeals on appeal, from the order entered on the decision of the general term, sustained it in its determination (86 *N. Y.* 575), but did not directly refer to the question here considered. The justice writing the opinion does, however, say, "Most of the objections to the title set up by the purchaser have been answered by the learned general term," thus in effect approving of its conclusions.

* The provisions of the Code relating to service of summons by publication apply equally to an infant as to an adult. Syracuse Savings Bank v. Burton (*Supm. Ct., Ulster Co. Sp. T., July*, 1884), 6 *N. Y. Civ. Pro.* 216.

tion of that question leads to the conviction, namely, [12] that when the application is made for the appointment of a guardian and it appears in the petition that the minor is fourteen years and upwards, it may very well be presumed, when no order thereto is made, that the court passing upon the application did not consider it necessary to order a further service. This arises from the language of the section, that the court may in its discretion, with or without an application therefor, make an order requiring a copy of the summons to be delivered to some person designated in the order.

The judgment pronounced must be sustained, but for the reasons now stated.

Van Brunt, P. J., concurred.

DURANT, as Executor, etc., Appellant, v. ABENDROTH, Impleaded, etc., Respondent.

Supreme Court, First Department, General Term, March, 1888.

§§ 3228, 3234, 3238, 3256.

Costs—Right to, where costs of appeal directed to abide event—Disbursements.

Where a verdict is directed in favor of a plaintiff on certain causes of action mentioned in the complaint, and for the defendant upon other distinct causes of action contained in the same complaint, the defendant as well as the plaintiff is entitled to costs, [1,10] and their award is in no manner discretionary; [10] but costs and disbursements of an appeal from a former judgment in defendant's favor, in which he was unsuccessful and which resulted in an order directing a new trial with "costs to abide the event," should not be included in the costs so taxed by him.[9]

In the supreme court, where a judgment is reversed and a new trial ordered, with "costs to abide the event of the action," the party succeeding upon the appeal is entitled to costs of the appeal if he

finally succeeds in the action, but if he does not he is not entitled to such costs, [2] for the reason that it is considered unjust to allow a party through whose acts costs were needlessly accumulated to avail himself of an indefensible position taken by him, and in that manner finally secure their allowance.[4] While the court of appeals has prescribed a different rule for the consideration and effect of this direction in an order of reversal, [7] that rule applies only to an order made by that court and not to orders of the general term of the supreme court.[8]

Comly *v.* Mayor (1 *N. Y. Civ. Pro.* 306), overruled and not followed; [5] Sheridan *v.* Genet (1 *Id.* 309, note); [3] Union Trust Company *v.* Whiton (17 *Hun,* 593; appeal dismissed, 78 *N. Y.* 491), [6] followed.

Witness fees should not be allowed for the attendance of witnesses where the affidavit upon which it is sought to tax them does not show that the witnesses have been sworn upon the trial, or, if they were not sworn, that their attendance had been obtained in good faith, with the expectation that their evidence would become material on the trial of the issue.[11]

Where a judgment in favor of the defendant in an action was reversed and a new trial ordered, and on the new trial the plaintiff succeeded on some causes of action and the defendant upon others,—*Held,* that that there was no legal ground for objection to the taxation by the defendant of sheriff's term fees; of charges for affidavits and acknowledgments; of clerk's fees for entering the first judgment; of the expense paid for a copy of the opinion of the general term, and of the fee paid for a copy of the minutes of the first trial, where the bill of costs in which they were contained had appended the usual affidavit, to the effect "that the foregoing disbursements have been made or will be necessarily incurred," but a charge therein for sheriff's jury fees and for a satisfaction-piece should be disallowed unless evidence sustaining and authenticating them is produced.[12]

Durant *v.* Abendroth, (9 *N. Y. Civ. Pro.* 446), reversed.

(*Decided March,* 1888.)

Appeal by plaintiff from an order denying a motion made by him for a new taxation of the defendant's bill of costs.

Reported below 9 *N. Y. Civ. Pro.* 446.

This action was brought upon nineteen distinct causes of action, and was first tried on October 11, 1882, and resulted in a judgment in favor of the defendant, from which the plaintiff duly appealed to the general term of

this court; that appeal was decided March 5, 1886, and resulted in an order reversing the judgment theretofore entered in favor of the defendant and directing a new trial, "costs to abide the event." The action again came on for trial on March 23, 1886, before the Hon. C. H. Van Brunt and a jury, and a verdict was rendered by direction of the court in favor of the plaintiff upon nine causes of action for the sum of $3,388.53, in favor of the defendant on six causes of action, and the complaint was dismissed as to three causes of action.

The defendant thereafter served a bill of costs, in which were included the following items of costs:

Costs before notice of trial	$10 00
Costs after notice of trial	15 00
Term fees	50 00
Trial fee, issue of fact	30 00
Trial fee, issue of fact, second trial	30 00
Allowance by court	500 00
Proceedings after granting and before new trial	25 00
Making and serving amendments	10 00
On appeal to general term, before argument	20 00
On appeal to general term, for argument	40 00

The plaintiff excepted to all these items except that for term fee, for one trial fee, and allowance by court. The plaintiff also excepted to the following items of disbursements included in said bill of costs:

Sheriff's term fees	$4 00
Affidavits and acknowledgments	1 85
Certified copies orders	90
Clerk's fees taxing costs	25
Transcript and filing	12
Printing points	6 00
Copies of following papers, opinion	2 10

Also to the witness fees; and the clerk overruled all these objections, but he disallowed the following charges upon objection being made: One extract from minutes, $.10; one clerk's fee on entering judgment, $.50; satisfac-

tion piece, $.25; sheriff's fees on execution, $.72, and a part of the witness fees. The bill of costs had annexed thereto the usual affidavit made by one of the attorneys for the defendant, "that the foregoing disbursements have been made in this action or will be necessarily incurred therein to the best of his knowledge and belief," and had also annexed thereto an affidavit "that the witnesses named in the bill of costs hereto annexed severally necessarily attended as witnesses on the part of the defendants in this action; that they were severally and necessarily in attendance on the trial of this action the number of days stated in said bill of costs."

The objections were made upon an affidavit, and motion for a new taxation of costs was thereafter made by the plaintiff's attorneys upon said affidavit, and another affidavit setting forth the disposition made by the clerk of said objections and upon the bill of costs and the affidavits thereto annexed.

The court at special term denied a new taxation, and the plaintiff thereupon took this appeal from the order there entered in accordance with such direction.

Gustavus W. Rawson (*Norwood & Coggeshall*, attorneys for plaintiff), appellant.

The costs and disbursements on appeal to the general term from the first judgment, and of the first trial, should have been disallowed in defendant's bill of costs, and the reversal of the first judgment by the general term order, with costs, to abide the event, entitled only the party successful on said appeal, the plaintiff, to tax said costs. Two constructions have been placed upon the words, "costs to abide the event." 1st. That the party successful on the appeal, and who succeeds in reversing the judgment, is alone entitled to tax the general term costs. 2d. That the party eventually or finally successful in the action, is alone entitled to tax said costs. The court of appeals, in construing their own order, and

other courts, and the supreme court in other departments, have followed the second construction, but the "settled rule in this, the first department, has again and again been declared to be, that 'costs to abide the event' mean to the party successful on the appeal." Sheridan *v.* Genet, 1 *N. Y. Civ. Pro.* 309, *note*. . . . . Lydd *v.* Kenny, 1 *Id.* 310 *note*; Union Trust Company of N. Y. *v.* Whiton, 17 *Hun*, 593; Comly *v.* Mayor, 1 *N. Y. Civ. Pro.* 307. . . . In the case of First N. Bank of Meadville *v.* Fourth N. B. of N. Y., 1 *N. Y. Civ. Pro.* 318, *note* the court of appeals referred to the case of the Union Trust Co. *v.* Whiton, and said, in that case, "we refused to interfere with the construction given by the general term of the first department to its own order." The question, however, here is as to the construction of our order, and the decision in this case has reference only to the construction of the order of the court of appeals. Mr. Austin Abbott in 11 *Abb. N. C.*, 218, *note*, says the general term in the first department hold, as a general rule, that the party unsuccessful on the appeal, although successful in the action, is entitled to costs, and cites Union Trust Company *v.* Whiton, above referred to. The plaintiff was the successful, or prevailing party, on the appeal, and therefore was alone entitled to tax the costs of the first trial and general term. The right to costs in an action is regulated by sections 3228, 3229 and 3230 of the Code of Civil Procedure,—which provide, in substance, that except in cases where costs are discretionary, that in actions where the complaint demands judgment for a sum of money only, the plaintiff is entitled to costs if he recovers over $50, and that defendant is entitled to costs upon the rendering of a final judgment, unless the plaintiff is entitled to costs. In this action, the plaintiff recovered a judgment for $3,388.53 against the defendant, and would alone be entitled to costs under the foregoing sections. Section 3234 of the Code modifies sections 3228 and 3229. . . . Section

3234 in no wise loses sight of the general provisions for costs. It was never intended, by allowing defendant costs by such section, to declare him the prevailing or successful party. This question is but a remodeling of section 26 of chapter 10 of part III. of the Revised Statutes. 2 *R. S.* 617. . . .

The following costs and disbursements should have been disallowed in defendant's bill of costs,—the order of the general term having reversed said judgment and ordered a new trial, the judgment was entirely vacated and declared erroneous,—the costs before trial, $10; costs after notice of trial, $15; trial for issue of fact, 2nd trial, $30; proceedings after granting and before new trial, $25; . . . also on appeal to the general term, before argument, $20; on appeal to general term, for argument, $40; making and serving amendments, $10, as the general term order made the costs to abide the event. Sheriff term fees are paid by the plaintiff, who is alone responsible for the same, and should have been disallowed; also $1.85 for the defendants and acknowledgments, 90 cents, certified copies of orders, as there was no affidavit presented sufficient to sustain such expenditure. $5 for stenographer's fees should have been disallowed, as they could only be used by plaintiff, who took the appeal. Varnum *v.* Wheeler, 9 *N. Y. Civ. Pro.* 421.

The 50 cents allowed to remain by clerk for entering judgment should have been disallowed, as it was plaintiff's duty to enter the judgment; 12 cents for transcript and filing, because no transcript and filing, was necessary to be filed in this court; $6, printing points, as they are part of the general term disbursement, which went to plaintiff under the general term order. $2.10, for copies of opinion are not taxable. All the witness' fees should have been disallowed, as the affidavit presented was totally insufficient to sustain such. Sargent *v.* Warren, 41 *Hun*, 103.

William H. Arnoux and *David F. Butcher* (*Arnoux, Ritch & Woodford*, attorneys), for defendant—respondent.

It is now the settled law of this State that where an order of the general term is made, "with costs to abide the event," the party ultimately successful is entitled to tax general term costs, although the appellant is successful upon the appeal.

Until recently, no question was ever made since the decision in Koon *v.* Thurman, 2 *Hill*, 357, where the law was laid down as above stated. The doctrine of that case is applied to cases arising under the Code, in Mott *v.* Consumers' Ice Co., 8 *Daly*, 244; Van Dyck *v.* Baker, 11 *Hun*, 309. Recently, however, the general term in Union Trust Co. *v.* Whiton, 17 *Hun*, 593, decided that such costs could not be so taxed. The court of appeals dismissed the appeal. This ruling was followed at special term in Sheridan *v.* Genet, (1 *N. Y. Civ. Pro.* 309, *note*), Lyddy *v.* Kenney (1 *Id.* 310, *note*), and in the First Nat. Bank *v.* Fourth Nat. Bank (1 *Id.* 318, *note*).

The case of First Nat. Bank *v.* Fourth Nat. Bank was appealed to the general term, and there affirmed (22 *Hun*, 563). But the appellant, not satisfied with the decision, appealed to the court of appeals and there the order was reversed (1 *N. Y. Civ. Pro.* 318, *note*), and the court said: "The order did not limit the recovery of costs to the prevailing party on the appeal. The terms on which a new trial is granted as respects costs are within the discretion of the court. This court has often limited the recovery of costs on appeal to one of the parties, but where the order reversing a judgment and granting a new trial is made "with cost to abide the event," without other limitation, we understand that the party finally succeeding in the action is entitled to tax them;" and see Murtha *v.* Curley, 92 *N. Y.* 359.

The old rule of Koon *v.* Thurman is re-asserted. See opinion of Andrews, J., in First Nat. Bank *v.* Fourth Nat.

Bank (1 *N. Y. Civ. Pro.* 318, *note*). The question then came up again in this department before Justice Barrett, at special term, October, 1881, in the case of Comly *v.* Mayor, (1 *N. Y. Civ. Pro.* 306), and there the ruling of the court of appeals was followed, and it was held, that "costs of appeal to abide the event" are taxable in favor of the party ultimately successful, saying in his opinion on that, "If it had been otherwise, the order would have read, costs to the appellant to abide the event," and dismissed the motion for re-taxation, the Clerk having taxed in favor of the ultimately successful party. Justice Donohue, on May 24, 1882, affirmed a taxation in a similar case on the above decision, and stated that the party ultimately successful was entitled to all the costs. In Sanders *v.* Townsend (11 *Abb. N. C.* 217), Van Hoesen, J., it was held that when a judgment was reversed by the appellate court, with costs to abide the event, and without other limitations, the finally prevailing party was entitled to the costs of the appeal. The defendant is entitled to tax costs before and after notice, and the trial fee of the first trial. Howell *v.* Van Sicklen, 8 *Hun*, 524.

Daniels, J.—Upon the trial of this action a verdict was directed in favor of the plaintiff for certain causes of action mentioned in the complaint, and for the defendant upon other and distinct causes of action [1] contained in the same complaint. This direction entitled the defendant to costs under section 3234 of the Code of Civil Procedure, but in their adjustment the costs and disbursements of an appeal taken by the plaintiff from a preceding judgment in the defendant's favor, were allowed to the defendant as part of the costs he was considered entitled to recover. Upon that appeal the defendant was unsuccessful, and the judgment which had been recovered in his favor was reversed.

In reversing the judgment and ordering a new trial,

the order directed the costs to abide the event of the action. This direction has been considered by this court not to authorize the party in whose favor the judg-
[2] ment reversed had been recovered to an allowance of the costs of the appeal, even though he succeeded eventually and finally in the litigation. It has been held by this general term, the opinion being delivered by Mr. Justice Brady, in the case of Sheridan *v.* Genett (1 *N. Y. Civ. Pro.* 309, *note*), that the
[3] party finally succeeding should not be allowed the costs of an appeal taken to correct an erroneous ruling which had resulted from the position taken by him in the course of a previous trial. This conclusion
[4] commended itself to the adoption of the court, for it was considered unjust to allow a party through whose act costs were needlessly accumulated to avail himself of an advantage of an indefensible position taken by him, and in that manner finally secure their allowance. And a direction that the costs of the appeal resulting in the reversal of the judgment should abide the event was not considered entitled to be construed in such a manner as to give such costs to the unsuccessful party in the appeal. They were made discretionary by section 3238 of the Code of Civil Procedure, and it was regarded as the best exercise of that discretion not to allow such costs to be recovered by the party whose conduct had erroneously subjected the other side to the necessity of incurring them.

[5] A difference of opinion has existed as to the construction of this direction in the order, and in Comly *v.* Mayor (1 *N. Y. Civ. Pro.* 306), it was held at the special term that the successful party in the litigation might recover such costs. But this was not in harmony with the decision of the general term in the case already mentioned, a report of which is contained in a note to the case just cited, page 309. And the same

ruling was followed in Union Trust Co. *v.* Whiton
[6] (17 *Hun.* 593). And an appeal from that decision
was dismissed by the court of appeals and the case again reported in 78 *N. Y.* 491. This dismissal of the appeal proceeded upon the ground that it was for the general term to construe and carry its own discretionary order into effect.

On the hearing of the motion at the special term* the conclusion was adopted that the court of appeals had afterward prescribed a different rule for the construction and effect of this direction in an order of reversal, but
this construction was given only to the orders made in
[7] the court of appeals (First Nat. Bank, &c. *v.* Fourth
Nat. Bank, 1 *N. Y. Civ. Pro.* 318, *note*; Murtha *v.* Curley, 92 *N. Y.* 359. That court has held in these cases that such a direction, contained in its own orders, will entitle the unsuccessful party, upon an appeal, to claim and adjust in his favor the costs of the appeal where he may be
finally successful in the action. The decisions apply
[8] to the orders of the court of appeals and not to the
orders of the general term of the supreme court. As to these orders, no change has been made in the decision previously announced declaring it to be for the general term to determine what construction should be given to this
language when inserted in its own order. The costs
[9] on the appeal, therefore, including the stenographer's
fees for copy of his minutes, and amendments to the case, and all disbursements attending the appeal should not have been allowed to the defendant upon the adjustment made in the action.

The costs of the trial in which the defendant was suc-
[10] cessful and the judgment upon which was reversed in
the disposition of the appeal, stand upon a different ground. The action was one where the successful party by the provisions of the Code was entitled to recover such

* The opinion filed at special term is reported 9 *N. Y. Civ. Pro.* 446.

costs. They were in no manner discretionary. And as to the costs of the trial which were objected to, they were legally allowed (Howell *v.* Van Sicklen, 8 *Hun*, 524).

But in allowing these costs, items were included which the defendant was not entitled to have adjusted in his favor. The witnesses' fees claimed by him could [11] not be allowed without an affidavit, and that which was made to sustain his right to such fees was wholly insufficient. It did not show that the witnesses had been sworn upon the trial, or, if they were not sworn, that their attendance had been obtained in good faith, with the expectation that their evidence would become material on the trial of the issues. It was wholly insufficient. And the allowances made for witnesses' fees should also be stricken out of the bill unless, upon a readjustment, a proper affidavit entitling defendant to these fees shall be produced.

There seems to be no legal ground of objection to the term fees included in the bill, nor to the charge for [12] affidavits and acknowledgments, or for the fees of the clerk for entering the first judgment, or the expenses paid for a copy of the opinion of the court, or the fee paid to the clerk for a copy of the minutes on the first trial, but the charge for a satisfaction-piece and the sheriff's jury fees seems to be without support. As to them, they should be excluded from the bill, unless some evidence shall be produced authenticating and sustaining them.

The order should be reversed and an order entered directing a readjustment of the costs by excluding from the bill the items which the clerk should not have allowed, including the witnesses' fees, unless a further and sufficient affidavit shall be produced, sustaining the defendant's right to the allowance of these fees. And no costs, either on the appeal or the decision of the motion, should be allowed to either party.

Van Brunt, P. J., and Brady, J., concurred.

JORDAN *v.* HARRISON.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, MARCH, 1888.

§§ 549, 557

Order of arrest—Affidavit to procure—When insufficient.

In an action for slander, the right of the plaintiff to an order of arrest arises out of the action itself, and does not depend upon extrinsic facts; but notwithstanding this, the rules applicable to the granting of such orders as to the manner in which allegations should be pleaded, or the facts stated, are not in any way different from those governing in other classes of cases.

The affidavits upon which an order of arrest is granted, must be positive, and make out a *prima facie* case against the defendant, and must satisfy the judge judicially that a cause of action exists, and that it is a proper one for an arrest.

Some of the material allegations upon which an order of arrest is granted, may be stated, upon information and belief, but such a statement, to be sufficient, must set forth the sources of the information and the grounds of the belief; the residence of the informants; the reasons why their affidavits cannot be obtained, and the terms, as near as may be, in which the information was communicated.

City Bank *v.* Lumley (28 *How. Pr.* 397); De Nierth *v.* Sidner (25 *Id.* 419); Whitlock *v.* Roth (5 *Id.* 143), followed.

Where the affidavit upon which an order of arrest was granted, in an action for slander, and the complaint therein, were both made solely upon information and belief, the order of arrest should be vacated.

It is not necessary that a motion to vacate an order of arrest on the ground that the affidavits on which it was granted are insufficient, should be made returnable before the judge who granted the order.

(*Decided March* 27, 1888.)

Motion by defendant for an order vacating an order for his arrest, granted in this action.

The action was brought to recover $40,000 damages for slanders, alleged to have been uttered by the defendant, of and concerning the plaintiff. The plaintiff, upon the complaint and affidavits substantially repeating its substance, obtained an order for the defendant's arrest, under which he was arrested and held to bail, which order the defendant seeks, by this motion, to have vacated and set aside. Other facts are stated in the opinion.

Jeroloman & Arrowsmith, for the defendant and motion.

An affidavit upon the information and belief is clearly insufficient; the principal facts must be stated positively. When such facts are not within the actual knowledge of the plaintiff or his witness, information may be stated; the source of such information must also be stated, and the inability to obtain the affidavit of witnesses. Dreyfus *v.* Otis, 54 *How. Pr.* 405. To the same effect: Moore *v.* Calvert, 9 *Id.* 474. Also source must be stated, so that court may see that it was not communicated merely so that affiant could make the affidavit. Blason *v.* Bruno, 21 *How. Pr.* 112; Cook *v.* Roach, 21 *Id.* 152; Muller *v.* Perrin, 14 *Abb.* Pr. N. S. 96; Griswald *v.* Sweet, 49 *How. Pr.* 171.

Miller & Savage, for plaintiff, opposed.

An order of arrest, granted under Code Civ. Pro. § 549, subd. 2, and the right to it depend upon the nature of the action, and not upon intrinsic facts, as would be the case if the order had been granted under section 550. It has been expressly determined, that in such cases the complaint may be considered as an affidavit. Palmer *v.* Hussey, 59 *N. Y.* 647.

It has been held, when the affidavit was mostly on information and belief, and defendant, on a motion to discharge the order, did not deny the allegations, that on an appeal, the court would assume such allegations as con-

ceded to be true. See 1 *Bliss's Code Civ. Pro.* § 557, p. 485, notes *d* and *e*, and cases there cited; also *Id.* p. 493, notes *k*, *l*. "In an action where the right to arrest does not depend upon facts extrinsic to the cause of action, the court will not vacate the order of arrest, unless satisfied upon the facts that it would feel bound to nonsuit the plaintiff, or direct a verdict for the defendant on a trial. *Id.* p. 495, note *h*. Hower *v.* Smith, 1 *Law Bul.* 10; Peck *v.* Lombard, 22 *Hun*, 63. The affidavit of the plaintiff showed that a sufficient cause of action exists against the defendant; that only was pre-requisite to the right to obtain the order. As to cases arising from the facts extrinsic to the cause of action, see 1 *Bliss's Code Civ. Pro.* p. 495, notes *l*, *m*. In any case where allegations, even made upon the information and belief are not denied, the objection that they are so made can have but little weight. *Id.* p. 497, note 497; Graeffe *v.* Currie, 8 *N. Y. Civ. Pro.* 187, 191. . . . . *Code Civ. Pro.* § 568, says: "An application, specified in the last section, may be founded only upon the paper upon which the order is granted, in which case it must be made to the court, or, if the order was granted by a judge out of court to the same judge in court or out of court, and with or without notice, as he deems proper, and the application must be heard upon these papers only." The application to vacate the order herein was made to Justice Barrett, and returnable before him, or one of the justices of this court, and not before court itself; therefore, the application under this section of the Code was improperly made. Where defendant is not in custody, the motion to vacate an order of arrest should not be made on order to show cause. Garret *v.* Humier, 1 Monthly Law Bull. 42.

O'Brien, J.—This motion to vacate an order of arrest is made on the ground that all the allegations in the complaint and the facts stated in the affidavits accompanying the complaint are upon information and belief solely. The

action being for slander, the right to the order of arrest arose out of the action itself, and does not depend upon extrinsic facts; and while this distinction is marked in all the decisions, I cannot find that the rules applicable to the granting of orders as to the manner in which allegations should be pleaded on the facts stated to be in any way different.

The cases all hold that the affidavit must be positive and make out a *prima facie* case against the defendant. The judge must be satisfied judicially from the affidavits that a cause of action exists, and that it is a proper one for an arrest. Some of the material allegations may be settled upon information and belief where the affidavits state the nature, quality and means of information, Crandall *v.* Bryan, 15 *How. Pr.* 48.

The statement on information and belief may be sufficient when the sources of the information and grounds of the belief are stated, where the residence of the informants and their affidavits cannot be obtained (City Bank *v.* Lundy, 28 *How. Pr.* 397; Bliss Code, 484, notes *l* and *m*).

It should appear how the information was derived, and the terms as near as can be in which it was communicated, and why the person communicating did not himself make the affidavit (Bell *v.* Mali, 11 *How. Pr.* 254; De Nierth *v.* Sidner, 25 *How. Pr.* 419).

In the case last cited the court says that the general rule is succinctly laid down in Whitlock *v.* Roth. 5 *Id.* 143), in these words: "So far as the facts may be within the knowledge of the plaintiff they must be stated positively, but so far as they necessarily rest on information derived from others, they may be so stated, when the sources and nature of the information are particularly set out, and a good reason is given why the positive statement of them cannot be procured." Again: "The sources of the information obtained must be set forth so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes."

The application of these rules to the present case is fatal to the order of arrest. There is no positive statement of any material facts, and whether we regard the complaint as an affidavit or consider the facts stated in the affidavit itself in each we find substantially the same statements alleged and set forth solely upon information and belief.

I do not think the point well taken that a motion to vacate must be made returnable before the judge who granted the order.

The order must therefore be vacated, with costs.

PEET AND ANOTHER *v.* HATCHER.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, FEBRUARY, 1888.

§§ 604, subd. 2, 635.

Injunction—Instance of, not upheld—Not granted in aid of attachment.

An injunction under subdivision 2, of section 604 of the Code of Civil Procedure restraining a defendant and his agents from removing or disposing of his property during the pendency of an action, with intent to defraud the plaintiff, would go in a proper case against specific property or any property in the hands of the defendant or his agents, but it must be made to appear that the defendant has property upon which an injunction would act.

An injunction restraining the defendant in an action from a threatened disposition of property with intent to defraud the plaintiff cannot be granted in aid of an attachment. The proceedings to make an attachment effectual are established by law.

Instance of a case in which it was held that the title to certain property which the plaintiff in an action sought to restrain the defendant and agent from disposing of was not in such defendant but in his wife.

(*Decided February* 24, 1888.)

Motion for an order restraining the defendant from removing or disposing of or interfering with his property during the pendency of this action, and especially restraining him from removing or disposing of or interfering with any money due to him by any person within the jurisdiction of the court and from removing or disposing of or interfering with certain certificates of stock of the Georgia Construction Company.

This action was brought upon an account stated between the plaintiff and the defendant to recover the sum of $17,461.10, balance of moneys advanced by the plaintiffs to and for the account and use of the defendants at his request between May 30, 1885, and December 21, 1885, in buying and in selling cotton as brokers for the defendant and for expenses incurred in connection with such transactions. The summons and complaint were personally served on the defendant on January 4, 1888. Motion was made upon the summons and complaint setting forth these facts and also an affidavit showing that the defendant was a non-resident of the city of New York, and resides in Columbus, in the State of Georgia, and also averring that the defendant was the owner of a share of stock of the Georgia Construction Company, of the par value of $5,000, and of the market value of about $7,500, and that he had purchased upon credit, cotton to the extent of 10,000 bales upon which there was a profit of over $50,000; that he intended to depart from the State and return to Columbus, Georgia, and to take such profits with him and such shares of stock with him with the intent to defraud the plaintiffs, and contained statements of conversations had with the defendant substantiating such averments.

The affidavit of the defendant, in opposition to the motion, denied the conversation set forth in the moving papers to support the contention that he intended to depart from the State and to take his property with him

for the purpose of defrauding these plaintiffs, and alleged that whatever statements he made were made in relation to business of his wife; it also appears from the answering affidavits that on January 4, 1888, the plaintiffs caused an attachment to be levied on all the property of the defendant in the hands of and all debts due to him by James H. Parker, a cotton broker in the City of New York, and has also served a copy of the attachment upon the wife of the defendant.

Edward S. Clinch, for plaintiff and motion.

The motion for an injunction is made under Code of Civil Procedure, section 604, subdivision 2 . . . . The plaintiff having a specific lien upon the property attached, have the right to any remedial order that will protect them from against any destruction.

In Frost *v.* Mott, 34 N. Y. 253, the court held "that a party attaching property in the possession of his debtor, acquires a specific lien on his interest therein and is entitled, like a judgment creditor, to impeach the title of a fraudulent mortgagee."

See also Rinchey *v.* Stryker, 28 N. Y. 45; Kelly *v.* Lane, 42 Barb, 594; Thurber *v.* Blanck, 50 N. Y. 80. The levy of a judgment creates a specific lien sufficient to authorize an affirmative action for the protection of the lien. (Greenleaf *v.* Mumford, 30 How. Pr. 30), and if he can maintain an independent action because of this lien he is certainly entitled in an action in which the writ issues to any order the court has power to make to protect that lien during the pendency of the action.

T. Henry Dewey, for defendant, opposed.

Patterson, J.—The application for the injunction in this case is based upon sub. 2 of sec. 604 of the Code of Civil Procedure. Under that subdivision an injunction in a proper case would go against specific property, or any

property in the hands of the defendant or his agents, but it must be made to appear that the defendant has property upon which an injunction would act. Here the affidavits interposed on behalf of the defendant show that the property mentioned in the moving papers belongs to Mrs. Hatcher, and not to the defendant, and she shows further that she received it from other sources and not from her husband. General reflections upon the improbability of a woman engaging in cotton speculations cannot prevail against positive oaths accompanied by circumstantial details of ownership. The authority for this injunction is contained in the section of the Code referred to. It cannot be upheld as an aid to an attachment. A proceeding is established by law to make an attachment effectual. It cannot be done in this application.

Motion to continue the injunction denied, with $10 costs.

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